

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
O'Connell, P.J., Fitzgerald and Murray, JJ

WAYNE COUNTY,
Plaintiff/Appellee,

vs

Supreme Court No. _____
Court of Appeals No. 239438
Wayne Circuit Court No. 01-113583-CC

EDWARD HATHCOCK,
Defendant/Appellant.

WAYNE COUNTY,
Plaintiff/Appellee,

vs

Supreme Court No. _____
Court of Appeals No. 239563
Wayne Circuit Court No. 01-114120-CC

AARON T. SPECK and
DONALD E. SPECK, individuals,
Defendants/Appellants.

WAYNE COUNTY,
Plaintiff/Appellee,

vs

Supreme Court No. _____
Court of Appeals No. 240184
Wayne Circuit Court No. 01-113584-CC

AUBINS SERVICE, INC., DAVID R. YORK,
Trustee, David R. York Revocable Living Trust,
Defendants/Appellants.

WAYNE COUNTY,
Plaintiff/Appellee,

vs

Supreme Court No. _____
Court of Appeals No. 240187
Wayne Circuit Court No. 01-113587-CC
01-114116-CC
01-114118-CC
01-114127-CC

JEFFREY J. KOMISAR,
Defendant/Appellant.



WAYNE COUNTY,
Plaintiff/Appellee,

Supreme Court No. _____
Court of Appeals No. 240189
Wayne Circuit Court No. 01-114113-CC

vs

ROBERT WARD and LELA WARD,
Defendants/Appellants,

and

HENRY Y. COOLEY,
Defendant.

WAYNE COUNTY,
Plaintiff/Appellee,

Supreme Court No. _____
Court of Appeals No. 240190
Wayne Circuit Court No. 01-114115-CC

vs

MRS. JAMES GRIZZLE and
MICHAEL A. BALDWIN,
Defendants/Appellants,
and

RAMIE FAKHOURY,
Defendant.

WAYNE COUNTY,
Plaintiff/Appellee,

Supreme Court No. _____
Court of Appeals No. 240193
Wayne Circuit Court No. 01-114122-

vs

STEPHANIE A. KOMISAR,
Defendant/Appellant.

WAYNE COUNTY,
Plaintiff/Appellee,

Supreme Court No. _____
Court of Appeals No. 240194
Wayne Circuit Court No. 01-114123-CC

vs

THOMAS L. GOFF, NORMA GOFF,
MARK A. BARKER, JR. and
KATHLEEN A. BARKER,
Defendants/Appellants.

WAYNE COUNTY,
Plaintiff/Appellee,

vs

Supreme Court No. _____
Court of Appeals No. 240195
Wayne Circuit Court No. 01-114124-CC

VINCENT FINAZZO,
Defendant/Appellant,

and

AUBREY L. GREGORY and DULCINA GREGORY,
Defendants.

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PLAINTIFF/APPELLEE WAYNE COUNTY'S
BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

Defendants/Appellants' statement of jurisdiction is complete and correct.

COUNTER-STATEMENT OF QUESTIONS INVOLVED

- I. DID THE TRIAL COURT AND COURT OF APPEALS PROPERLY UPHOLD THE TAKINGS IN THESE CASES BECAUSE MCL 213.21, *ET SEQ.*, GRANTS WAYNE COUNTY THE AUTHORITY TO CONDEMN THESE PARCELS?

Trial Court answered: Yes.

Court of Appeals answered: Yes.

Plaintiff/Appellee answers: Yes.

Defendants/Appellants answer: No.

- II. DID THE TRIAL COURT AND COURT OF APPEALS PROPERLY CONCLUDE THAT IT IS NECESSARY FOR WAYNE COUNTY TO CONDEMN THESE PARCELS IN ORDER TO CREATE THE PINNACLE PROJECT?

Trial Court answered: Yes.

Court of Appeals answered: Yes.

Plaintiff/Appellee answers: Yes.

Defendants/Appellants answer: No.

- III. DID THE TRIAL COURT AND COURT OF APPEALS CORRECTLY CONCLUDE THAT THE CLEAR AND SIGNIFICANT PUBLIC BENEFITS TO BE CREATED BY THE PINNACLE PROJECT PREDOMINATE OVER ANY PRIVATE BENEFIT, THEREFORE SATISFYING THE PUBLIC PURPOSE TEST ARTICULATED IN *POLETOWN*?

Trial Court answered: Yes.

Court of Appeals answered: Yes.

Plaintiff/Appellee answers: Yes.

Defendants/Appellants answer: No.

IV. IS THE PUBLIC PURPOSE TEST IN *POLETOWN* CONSISTENT WITH ARTICLE 10, §2 OF THE 1963 MICHIGAN CONSTITUTION?

Trial Court answered: Did not answer.

Court of Appeals answered: Did not answer.

Plaintiff/Appellee answers: Yes.

Defendants/Appellants answer: No.

V. SHOULD THE COURT OVERRULE *POLETOWN*, AND IF SO, SHOULD THAT DECISION BE APPLIED RETROACTIVELY TO BAR THESE TAKINGS?

Trial Court answered: Did not answer.

Court of Appeals answered: Did not answer.

Plaintiff/Appellee answers: No.

Defendants/Appellants answer: Yes.

COUNTER-STATEMENT OF FACTS

Plaintiff/Appellee Wayne County (the “County”) has purchased the vast majority of the 1,300 acres necessary to construct an economic development project immediately south of Metropolitan Airport (Tr, 9/24/01, p 20, Apx 20b). In this case, the County seeks to condemn the remaining *two percent* of the property needed to complete this project, which will transform these 1,300 acres of predominantly vacant, unutilized and fallow land into a world-class development, expected to generate up to 30,000 new jobs and \$350 million in revenue within the County (Tr, 9/28/01, p 25, Apx 597a; Trial Exhibit No. 28, Apx 364b, parcels colored red are those properties subject to this appeal).

The County, via its Jobs and Economic Development Department, conceived and designed the Pinnacle Aeropark Project (the “Pinnacle Project”) to create thousands of jobs, and tens of millions of dollars in tax revenue, while broadening the County’s tax base from predominantly industrial to a mixture of industrial, service and technology. The Pinnacle Project will enhance the image of the County in the development community, aiding in its transformation from a highly industrial area, to that of an arena ready to meet the needs of the 21st century (Tr, 9/24/01, p 55-56, Apx 55b). This cutting-edge development will attract national and international businesses, leading to accelerated economic growth and revenue enhancement (*Id.*; Tr, 9/26/01, p 57-59, Apx 125b). The County has secured funding to improve the woefully inadequate existing utilities and is prepared to begin extensive improvements to the water, sewer and storm water systems, as well as the roadways, both inside and outside the park boundaries (Tr, 9/28/01, p 30-37, Apx 602a).

The County has partnered with the State of Michigan to create the Pinnacle Project (Tr, 9/24/01, p 39-41, Apx 39b). In June of 2000, the Michigan Legislature passed “Smart Park”

legislation. (See MCL 125.2162). The purpose of this law is to encourage clustering of technology companies, in partnership with local universities, as a way of broadening the State's tax base and encouraging technology-related industries to locate in Michigan. In April 2001, the Michigan Economic Development Corporation ("MEDC") named the Pinnacle Project as one of a select few areas in the State designated as a Smart Park (Tr, 9/24/01, p 39-44, Apx 39b).

The Pinnacle Project is an outgrowth of the \$2 billion renovation of Metropolitan Airport, which added a new jet runway and the Edward H. McNamara Terminal (Tr, 9/24/01, p 27, Apx 27b; see also The Metro Airport (visited February 5, 2004) <<http://www.metroairport.com>>). In 1992, the County implemented a program sponsored by the Federal Aviation Administration ("FAA") to assist residential property owners affected by the increased noise in areas adjacent to the airport (Tr, 9/24/01, p 27, Apx 27b). The FAA gave the County \$21 million to purchase residential properties in *voluntary* sales, but required the County to put the property it purchased to an economically viable use (Tr, 9/24/01, p 28, Apx 28b). When the County finished this noise abatement program, it owned 500 acres of residential and farm land scattered in a rough checkerboard pattern near Metropolitan Airport (Tr, 9/24/01, p 28, Apx 28b; Tr, 9/28/01, p 15, Apx 587a). Given the FAA's mandate that this property be made economically useful, County officials conceived of a future for the land it had purchased that would consist of a premier technology and business center, with a hotel, conference centers and other amenities that would work in tandem with, and complement, the new airport (Tr, 9/24/01, p 21-24, Apx 21b).

Of the many elements needed to make this development a reality, County officials realized that a contiguous land mass of sufficient size to make the development attractive was most important, because without a complete assemblage any type of meaningful development was

impossible (Tr, 9/26/01, p 54-55, Apx 122b). Boundaries were drawn in accordance with budgetary and other practical concerns, and an 1,800-acre area was delineated (later reduced to 1,300 acres) (Tr, 9/24/01, p 26, Apx 26b). A real estate broker approached property owners in the project area seeking *voluntary sales*, and eventually purchased another 500 acres on behalf of the County (Tr, 9/28/01, p 18, Apx 590a).

By spring of 2000, the County had purchased more than 200 parcels of property, totaling approximately one thousand acres, through the FAA noise abatement program and its own initiative (Tr, 9/28/01, p 14-18, Apx 586a; Trial Exhibit No. 3, Apx 363b). This was a substantial amount of property, and literally the bulk of the Pinnacle Project. To satisfy the FAA's mandate, the County only needed to acquire the final 300 acres of land. The owners of these 46 parcels refused to sell their land. The final properties were scattered throughout the project area, making any sort of meaningful development impossible without their acquisition (Tr, 9/26/01, p 54-55, Apx 122b; Tr, 9/28/01, p 18, Apx 590a).

With no other choices available, on July 12, 2000, the Wayne County Commission approved and adopted the Resolution of Necessity and Declaration of Taking ("Resolution of Necessity") to acquire, through condemnation, the property to complete the project area acquisition (Resolution of Necessity; Apx 522b). In compliance with the Uniform Condemnation Procedures Act, MCL 213.51, *et seq.*, the County had the subject parcels appraised, and it issued good faith written offers to property owners beginning in December 2000. Through these good faith offers, the County negotiated to purchase an additional 27 parcels, leaving only 19 parcels of property standing in the way of the Pinnacle Project and Wayne County's compliance with the FAA mandate.

At the end of April 2001, when the Defendants were unwilling to accept the good faith offers from the County, the County initiated condemnation lawsuits in Wayne County Circuit Court pursuant to 1911 PA 149, as amended by 1966 PA 351 and codified at MCL 213.21, *et seq.* Each Defendant filed a Motion Challenging the Necessity of the County's taking. See MCL 213.56. The Honorable Michael Sapala, Chief Judge of the Wayne County Circuit Court, presided over this necessity challenge, which lasted 10 trial days, spanning approximately 4 weeks.

During the trial, the County put forth a comprehensive presentation regarding the Pinnacle Project. The County's case consumed approximately 8 of the 10 days of trial testimony. In response to the County's proofs, the Defendants did not call a single adverse witness or enter any evidence into the record. When the trial court finally issued its 36-page Opinion on December 19, 2001, it meticulously reviewed the evidence and each of the parties' arguments. The trial court sustained the County's proposed takings, finding that: (1) there is statutory authority for the County's maintenance of the condemnation proceedings; (2) it is necessary to acquire the subject parcels; and (3) the acquisition of Defendants' properties serves a public purpose (Opinion, p 1-2, Apx 917a). The Defendants filed Motions for Reconsideration, and the trial court denied these motions on January 24, 2002. Defendants then appealed to the Court of Appeals, which granted leave to appeal on April 24, 2003. The Court of Appeals affirmed the lower court's ruling.

SUMMARY OF ARGUMENT

An unavoidable tension exists between individual property rights and the right of the community at large to further legitimate social goals. Where there is necessity to accomplish some public good that is otherwise impracticable "the abstract right (of an individual) to make use of his own property in his own way is compelled to yield to the general comfort and protection of the

community, and to a proper regard to relative rights in others.” *People ex rel Detroit & Howell R Co v Salem Twp Board*, 20 Mich 452, 480-481; 4 Am Rep 400 (1870).

An individual’s right to enjoy private property has historically been tempered by the government’s need to build roads, schools and other such truly “public” projects. The use of eminent domain, however, has not been restricted to such projects. Throughout our State’s history, public bodies have frequently partnered with private enterprise for the creation of mills, canals, toll roads, railroads, public utilities and the like. Eminent domain has been the tool to assemble land for these partnerships. In each of these instances, private interests have stood to benefit considerably, but courts have sanctioned such takings where the private benefit is not the reason for the taking, but instead is merely incidental to the public purpose. See generally, *Swan v Williams*, 2 Mich 427 (1852). As society has evolved, with changing needs and conditions, eminent domain has been utilized to clear away blighted areas and eventually, in *Poletown*, for the creation of an industrial park, in a city’s effort to boost its economy and provide for its citizens.

The County’s proposed takings are authorized by MCL 213.21, *et seq.*, a general enabling statute granting public corporations, like the County, the right to take private property for public purposes. Both lower courts applied the heightened scrutiny test announced in *Poletown*, correctly concluding that the Pinnacle Project will serve a public purpose, because the benefits to the public predominate over any incidental future private benefit. This Court now readies itself to revisit *Poletown* and determine whether its public purpose test is consistent with Article 10, §2 of the Michigan Constitution. As the County explains below, a historical analysis of Michigan takings jurisprudence demonstrates that *Poletown* is a legitimate expression of precedent leading up to the ratification of the 1963 Constitution. This fact, coupled with the large body of case law following

Poletown that correctly applied its holding to a variety of factual scenarios confirms the constitutionality of the “public purpose” test.

ARGUMENTS

I. THE TRIAL COURT AND COURT OF APPEALS PROPERLY UPHELD THE TAKINGS IN THESE CASES BECAUSE MCL 213.21, *ET SEQ.*, GRANTS WAYNE COUNTY THE AUTHORITY TO CONDEMN THESE PARCELS

The County brought these eminent domain proceedings pursuant to the authority the Michigan Legislature granted in 1911 PA 149, as amended by 1966 PA 351 and codified at MCL 213.21, *et seq.* (“Act 149”). Defendants argue that Act 149 does not grant the County authority to condemn property and that the County must rely on other statutory authority to institute these proceedings. However, as the County explains below, the Defendants’ argument is unsupported by the plain language of Act 149 itself. The unambiguous meaning of Act 149, which can be drawn from the text, allows the County, as a public corporation, to take private property necessary for public purposes within the scope of its powers for the use or benefit of the public. The County’s proposed takings are for a public purpose and are necessary. Consequently, the takings are authorized by Act 149.

A. Standard Of Review

Statutory interpretation presents a question of law that is reviewed de novo. *McCauley v General Motors Corporation*, 457 Mich 513, 518; 578 NW2d 282 (1998).

B. The Rules Of Statutory Construction

As this Court has explained on many occasions, “The fundamental rule of statutory construction is to give effect to the Legislature’s intent. That intent is clear if the statutory language is unambiguous, and the statute must then be enforced as written.” *Weakland v Toledo Engineering*

Co Inc, 467 Mich 344, 347; 656 NW2d 175 (2003) (citation omitted). Condemnees are not entitled to have a statute authorizing the use of eminent domain construed in a restrictive manner. “Statutes, including condemnation statutes, must be construed in such a manner as to effectuate their purpose, not defeat the legislative intent, and not lead to absurd results.” *Beier v St Clair Probate Judge*, 4 Mich App 502, 509; 145 NW2d 266 (1966), citing *Ballinger v Smith*, 328 Mich 23; 43 NW2d 49 (1950); *Webster v Rotary Electric Steel*, 321 Mich 526; 33 NW2d 686 (1948); *Parsons v Wayne Circuit Judge*, 37 Mich 287 (1877). Rather, the words in a statute must be given their plain or commonly-understood meaning; but any definition the Legislature supplies in a statute controls their meaning. See MCL 8.3a; see also *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159-160; 645 NW2d 643 (2002); *People v Morely*, 461 Mich 325, 330; 603 NW2d 250 (1999). Moreover, courts are bound to give effect to every word in a statute, and where possible, harmonize any conflicts that exist. *Nowell v Titan Ins Co*, 466 Mich 478, 482; 648 NW2d 157 (2002).

C. The Plain Language Of Act 149 Authorizes These Takings

As a sovereign, the State has the power of eminent domain, which it may delegate to municipalities and other governmental and public actors through legislation. See generally *In re Brewster Street Housing Site in the City of Detroit*, 291 Mich 313; 289 NW 493 (1939). In this case, the County relies on the Legislature’s delegation of eminent domain power in Act 149, and more specifically MCL 213.23, which provides:

Any public corporation or state agency is authorized to take private property necessary for a public improvement or for the purposes of its incorporation or for public purposes within the scope of its powers for the use or benefit of the public and to institute and prosecute proceedings for that purpose. When funds have been appropriated by the legislature to a state agency or division thereof or the office of the governor or a division thereof for the purpose of acquiring lands or property for a designated public purpose, such unit to which the appropriation has been made is

authorized on behalf of the people of the state of Michigan to acquire the lands or property either by purchase, condemnation or otherwise. For the purpose of condemnation the unit may proceed under the provisions of this act. [emphasis added].

Both parties agree that the trial court correctly held that the plain language of the statute permits condemnation under one of three circumstances: (1) for a public improvement; (2) for the purposes of its incorporation; and (3) for public purposes within the scope of its powers (Union, p 5, Appx 921a). Also, they concur that the statute requires the takings to be necessary, as well as for the use or benefit of the public.

The parties disagree, however, with respect to three matters involving the statute. First, whether the words “within the scope of its powers” modify each of the three circumstances for which private property may be taken. Second, whether the County, as a public corporation, has the authority under this statute alone to condemn property. Lastly, whether these takings are for public purposes within the scope of the County’s powers.

1. MCL 213.23 Provides The County With The Authority To Take Private Property For Public Purposes Within The Scope Of Its Powers

The words of the first sentence in MCL 213.23 are all the evidence the Court needs to determine the Legislature’s intent. The plain, common-sense reading of the statute’s language is that the language “within the scope of its powers” modifies the phrase that immediately precedes it – “for public purposes.” “For” in this context reveals an essential clause, while “or” acts as a disjunctive, separating ideas. Therefore, this sentence should be read as if it says

Any public corporation or state agency is authorized to take private property necessary [1] for a public improvement [2] or for the purposes of its incorporation [3] or for public purposes within the scope of its powers [4] for the use or benefit of the public ... [MCL 213.23.]

The last use of the word “for” without the disjunctive “or” indicates that use/benefit of the public is essential to the whole sentence.

The language of Section 4 of Act 149, MCL 213.24, which provides for the commencement of condemnation proceedings, reaffirms this interpretation, stating:

Proceedings may be commenced and prosecuted under this act whenever a public corporation or state agency shall have declared a public improvement or the purposes of its incorporation *or public purposes within the scope of its powers make it necessary*, and shall declare that it deems it necessary to take private property for such public improvement or for the purposes of its incorporation or for public purposes within the scope of its powers, designating the same, and that the improvement is for the use or benefit of the public. [Emphasis added.]

The reappearance of the language in this section demonstrates that “public purposes within the scope of its powers” is one circumstance for which a public corporation may condemn land. Here, the Legislature used only the disjunctive “or” to separate the three circumstances, avoiding the confusion that results from the mixture of the disjunctive and essential clauses found in MCL 213.23. As these two statutes were codified together and relate to the same subject, they must be read in *pari materia*. *Omne Financial Inc v Shacks Inc*, 460 Mich 305, 312; 596 NW2d 591 (1999). Construing these statutes together as one law, the only logical conclusion is that “public purposes within the scope of its powers” is an independent circumstance that authorizes the condemnation of private property. In fact, this Court has interpreted the language of MCL 213.24 to provide that a public corporation may commence condemnation proceedings when it has declared that public purposes within the scope of its powers make it necessary to take private property. *City of Lansing v Edward Rose Realty*, 442 Mich 626, 633; 502 NW2d 638 (1993). The same disjunctive language and use of the phrase “within the scope of its powers” to modify “public purposes” appears in MCL 213.25, a statute addressing the requirements for filing a condemnation petition.

The Defendants seek to torture the language of MCL 213.23 out of step with common sense, English language usage, and its plain terms. In essence, the Defendants argue that the phrase “within the scope of its powers” modifies the phrase “to take” at the beginning of the MCL 213.23 and does not modify the phrase “public purposes.” The Defendants’ interpretation would render “for public purposes” superfluous and would distort the statutory language. This is impermissible. See *Robertson v Daimler Chrysler Corp*, 465 Mich 732, 757; 641 NW2d 567 (2002). If, as the Defendants argue, the “within the scope of its powers” phrase modifies the taking itself, it would come after the authorization to take, but before the three circumstances under which a municipality can condemn and would read that: “[a]ny public corporation or state agency is authorized to take, within the scope of its powers, . . . for public purposes for the use or benefit of the public and to institute and prosecute proceedings for that purpose.” Defendants’ interpretation renders an otherwise readable and plain statutory provision incomprehensible, and therefore cannot provide the proper meaning.

2. The First Sentence Of MCL 213.23 Grants The County Authority To Condemn Private Property Without Additional Statutory Support

MCL 213.23 grants the County eminent domain power. Indeed, as the trial court noted, MCL 213.23 begins with words of authorization: “any public corporation or state agency *is authorized to take private property...*” (Opinion, p. 9, Apx 925a). To authorize is to “grant authority or power to,” to “approve or give permission for,” or to “be sufficient grounds for.” *The American Heritage Dictionary* (1991).

Case law confirms that public corporations may rely on Act 149, and Act 149 alone, to take private property. As this Court has stated in definitive terms, “This act provides for condemnation

of private property by State agencies and public corporations *Section 3 thereof empowers public corporations to exercise the right of eminent domain.*” *Union School District of the City of Jackson v Starr Commonwealth for Boys*, 322 Mich 165, 168-169; 33 NW2d 807 (1948) (emphasis added). It hardly requires mentioning that Act 149 does not contain language requiring another enabling statute to support a taking. If the Legislature intended to require additional authority, it could easily have done so in the language of the statute itself; however, it did not. The Defendants’ argument that Act 149 requires additional statutory authority to condemn stands in direct contradiction to the rules of statutory authority. Courts are not empowered to ignore or nullify whole legislative enactments without cause. See *State Treasurer v Schuster*, 465 Mich 408, 417-418; 572 NW2d 628 (1998).

The Defendants’ argument that condemnation statutes enacted after Act 149 demonstrate that the Legislature did not intend to confer the general power of eminent domain to public corporations in Act 149 is without merit. Act 149 is a general enabling statute. *Edward Rose, supra* at 637. Michigan courts reviewing the interplay between Act 149 and other condemnation statutes have repeatedly held that effect can and should be given to all condemnation statutes. See, e.g., *In Re Opening of Gallagher Avenue*, 300 Mich 309, 313; 1 NW2d 553 (1942).

This Court has addressed this issue on several occasions and has, in each instance, upheld a municipality’s ability to choose the condemnation statute under which it will proceed. For example, in *Gallagher Avenue, supra*, Wayne County, relying solely upon Act 149, condemned the defendant’s land for the opening of a new avenue. The defendant sought dismissal, arguing that Wayne County was required to proceed under a later-enacted statute, Act No. 352, PA 1925 (“Act 352”). This Court found that Act 352 and Act 149 were not inconsistent, holding that “quite apparently the latter statute was an attempt to broaden condemnation power and not to limit the

method nor make the latter act exclusive within its scope.” *Id.* Further, this Court noted that when two acts touch upon the same subject matter, effect should be given to both, if by reasonable construction it may be done. *Id.* at 313.

A few years later, this Court again took up the issue, this time with regard to condemnation of land for school purposes. In *Union School District, supra*, the condemning authority passed a resolution to acquire the defendant’s property under one condemnation statute, but the initial resolution was later rescinded. The condemning authority then proceeded instead under Act 149. At trial, the defendant challenged whether the taking was properly brought under Act 149. This Court answered in the affirmative, stating:

In the report of the judicial council of Michigan, January, 1931, a careful study was made of 17 different methods provided for by which various State agencies could exercise the right of eminent domain. Some of these methods apply only to certain agencies, while others apply to many agencies. Criticism has frequently been leveled at this system because of the confusion which it causes, but the recommendation of the judicial council of a single method was never submitted as a constitutional amendment. *Alternative methods are still left to certain public agencies. That pursued by plaintiff is proper, and is not in any way affected by the fact that plaintiff might have pursued a different method.* [*Id.* at 170. (Emphasis added).]

Following this Court’s reasoning in *Union School District*, the Court of Appeals held in *In re Warren Consolidated Schools*, 27 Mich App 452, 453-454; 183 NW2d 587 (1970), that a board of education could choose to proceed under either MCL 213.23 or MCL 340.711 (the School Code of 1955) to acquire land for a new school.

These decisions are determinative of the Defendants’ argument. They specifically address and reject the Defendants’ claim that MCL 213.23 is not a general grant of eminent domain power. Indeed, as this Court’s discussion in *Union School District, supra*, makes clear, the later enacted

statutes focused on by Defendants provide *alternative* methods to condemning agencies. They are therefore, not superfluous, but instead options from which municipalities may pick and choose.¹

Defendants argue that whatever original grant of condemnation power was provided by Act 149, the Legislature revoked that general grant of authority by enacting 1966 PA 295 at the same time it amended Act 149. But that argument has no merit whatsoever. Act 295, an act authorizing certain condemning authorities to acquire property for public highway purposes, includes an express savings clause providing that “[t]his act does not directly or by implication repeal or amend any other condemnation act or part thereof.” See MCL 213.391. Even without the savings clause, this Court has addressed this very issue and determined that the intent of the Legislature with regard to Act 149 is not as the Defendants argue, but rather the intent is the exact opposite:

Further, as bearing on the intent of the legislature, it is significant that at the very session when Act No. 352, Pub. Acts 1925 was passed, the section of Act No. 149, Pub. Acts 1911, dealing with corporations was amended... In so dealing with both acts at the same session, it is quite evident that the intent of the legislature was that both should be available to road commissioners seeking condemnation of land in cities for highway purposes. [*Gallagher Avenue, supra* at 313 (emphasis added).]

The Legislature has not repealed Act 149 during the ensuing years in which it enacted additional and more specific condemnation statutes. In fact, the section of Act 149 that prescribed trial procedures was repealed by the Legislature and moved to the UCPA, MCL 213.50, *et seq.* See 1980 PA 87, §26. At that time, however, the Legislature did not repeal Act 149 in its entirety, but

¹In the lower courts, Defendants argued that the passage of the Economic Development Corporations Act, MCL 125.1601, *et seq.*, somehow negates the County’s takings pursuant to Act 149. Defendants seem to have abandoned this argument, and thus, the County’s response is not included in this Brief. A lengthy discussion of this issue is included in the County’s Brief on Appeal for the Court of Appeals, Apx 248b.

instead chose to leave intact those sections that authorize condemnation. Act 149, therefore, remains a valid statutory basis to take private property.

3. These Takings Are Proper Because They Are For Public Purposes Within The Scope Of The County's Authority

The lower courts correctly concluded that the language of MCL 213.23 provides the County authority to take these parcels for public purpose within the scope of its powers. The County has the power to declare this type of project a public purpose. Wayne County is a home rule county. Section 1.112 of the County's Charter provides that:

Wayne County, a body corporate, possesses home rule power enabling it to provide for any matter of County concern and all powers conferred by constitution or law upon charter counties or upon general law counties, their officers, or agencies.

"Home rule" local governments are vested with general constitutional authority to act on all matters of local concern not forbidden by state law. *Airlines Parking, Inc v The County of Wayne*, 452 Mich 527, 537; 550 NW2d 490 (1996).

The compilers' comment to Wayne County's Charter explains:

Historically, counties were established as a convenient local administrative branch of the state government. Just as any other agency of state government, these "general law" counties had only those powers which were expressly granted to them, or which were necessarily implied from an express grant. Only cities and villages were recognized to have "home rule" powers, that is, a general power to provide for the health, safety and welfare of their constituents. [Wayne County Charter, Section 1.112, Compiler's Comment.]

In 1963, however, the people adopted Article 7, § 2 of the Michigan Constitution, extending home rule powers to counties, thereby enabling them to "adjust their government structure to meet modern problems effectively." *Lucas v Wayne County Election Commission*, 146 Mich App 742, 747; 381 NW2d 806 (1985), citing *Oakland County Commissioner v Oakland County Executive*, 98 Mich App

639, 645, fn 1; 296 NW2d 621 (1980). The Constitutional Convention Comment to this provision is illustrative:

A County charter may authorize the county to adopt resolutions and ordinances “relating to its concerns” subject to law. This means that the charter county need not have specific permission from the legislature to perform local functions and that such activities are limited only by legislative enactment.

Thus, while Act 149 provides the power to take, the County’s home rule power provides the authority to declare public purposes. The County has the power to adopt resolutions “relating to its concerns” and, as such, has the power to determine the public purposes it wishes to advance.

Undoubtedly, it was within the County’s home rule powers to provide for the welfare of its citizenry in renovating and expanding Metropolitan Airport. Moreover, the County’s implementation of the noise abatement program was aimed at improving the health and welfare of those residential property owners in the area who would otherwise be forced to live with the increased levels of noise pollution attributable to the addition of the new runway. The County was then charged with the duty of finding a use for the parcels purchased through the noise abatement program that would not only satisfy the mandate of the FAA, but would also further the well-being of the local communities, as well as its constituency as a whole. The County rose to the challenge, devising a plan that would best promote the interests of its citizens. The declaration of the Pinnacle Project as a public purpose was soundly within those powers conferred to the County through the Michigan Constitution and its Charter.

4. The Second And Third Sentences Of MCL 213.23 Place Restrictions Upon State Agencies Only And Are Not Applicable To The Facts Of This Case

The first sentence of MCL 213.23 grants public corporations and state agencies the power to condemn for particular purposes. The second and third sentences pertain only to state agencies and place restrictions on those entities' use of Act 149:

When funds have been appropriated by the legislature to a state agency or division thereof or the office of the governor or a division thereof for the purpose of acquiring lands or property for a designated public purpose, such unit to which the appropriation has been made is authorized on behalf of the people of the state of Michigan to acquire the lands or property either by purchase, condemnation or otherwise. For the purpose of condemnation the unit may proceed under the provisions of this act. [MCL 213.23].

There is no dispute that the County is a public corporation as defined in Act 149. See MCL 213.21. Whatever these last two sentences mean, they do not apply to public corporations, but only to state agencies. Further, these last two sentences of MCL 213.23 do not apply in *all* instances to state agencies, the office of the governor, and their divisions. Rather, they apply only “[w]hen funds have been appropriated by the legislature...for the purpose of acquiring lands or property for a designated public purpose.” While Defendants read this as a prohibition against condemning property in the absence of funding from the Legislature, the two sentences do not use any negative language indicating a prohibition. Indeed, MCL 213.24, which reflects the language of MCL 213.23 and provides further basis for instituting condemnation proceedings, does not incorporate any limitation that refers to funding from the Legislature, whether for public corporations, state agencies, the office of the governor, or other governmental entities. Nor does MCL 213.25, which prescribes the contents of a petition to condemn property, require an allegation that the proceedings are being undertaken pursuant to Act 149 and another statute. To the contrary, MCL 213.25 simply states that the petition must state that it is “made and filed as commencement of judicial proceedings *by the*

corporation or state agency in pursuance of this act,” referring to Act 149. Even if such a prohibition existed in the statute, it would not make sense to apply it to public corporations in light of the relative autonomy and separate funding mechanisms, such as local taxes and grants, on which public corporations rely.

II. THE TRIAL COURT AND COURT OF APPEALS CORRECTLY CONCLUDED THAT IT IS NECESSARY FOR WAYNE COUNTY TO CONDEMN THESE PROPERTIES FOR THE CREATION OF THE PINNACLE PROJECT

Wayne County submitted to the trial court its Resolution of Necessity, thereby establishing its prima facie case for the necessity of these takings. *City of Allegan v Vonasek*, 261 Mich 16, 21; 245 NW 557 (1932). The County presented an extensive and virtually uncontradicted record with regard to the need to take Defendants’ property, despite the fact that the Defendants bore the legal burden of proof in the necessity challenge. *Id.*; *Kalamazoo Road Commission v Dosca*, 21 Mich App 546, 548; 175 NW2d 899 (1970). After considering all this evidence from the County and none from the Defendants, the trial court produced a 36-page Opinion carefully scrutinizing each of the Defendants’ challenges to the necessity of the taking and supporting his holding affirming these takings with considerable fact and law. The Court of Appeals agreed with the trial court (Appeals Opinion, p 7, Apx 983a).

Defendants attack the County’s declaration of necessity on several separate yet interrelated grounds, all of which share a common theme: the Pinnacle Project is too speculative to support a finding of necessity. The Defendants’ challenge to necessity implicates factual determinations by both the County and the trial court. Yet, Defendants have failed to articulate and apply the correct standard of review to these issues, inviting this Court to review the record de novo. The de novo standard inappropriately denies both the County and the trial court the deference which they are due.

A. Standards Of Review

The Uniform Condemnation Procedures Act states that, “[w]ith respect to an acquisition by a public agency, the determination of public necessity by that agency *shall be binding* on the court in the absence of showing of fraud, error of law, or abuse of discretion.” MCL 213.56 (emphasis added). This standard of review is highly deferential, requiring that courts not interfere with the condemning authority’s decisions whether to condemn, where to draw boundaries, and which parcels to include. See *New Products Corporation v Ziegler*, 352 Mich 73, 86; 88 NW2d 528 (1958); *In re Huron Clinton Metropolitan Authority*, 306 Mich 373, 386-386; 10 NW2d 920 (1943).

A trial court’s factual findings on necessity and public purpose will not be reversed on appeal unless they are clearly erroneous. *City of Troy v Barnard*, 183 Mich App 565, 569; 455 NW2d 378 (1990); *Nelson Drainage District v Filippis*, 174 Mich App 400, 483; 436 NW2d 682 (1989); *Livingston County Road Commissioner v Herbst*, 38 Mich App 150, 154; 195 NW2d 894 (1972). In applying this principle, appellate courts give regard to the “special opportunity of the trial court to judge the credibility of those witnesses before it.” *Precopio v City of Detroit Department of Transportation*, 415 Mich 457, 461; 330 NW2d 802 (1982).

B. The Pinnacle Project Is Not Speculative

The testimony and other evidence presented in this case firmly established that the Pinnacle Project is not speculative. Mr. Michael Prochaska, the County’s business development director, testified that the County approached the land use planning process in three distinct steps.² First, the County attempted to establish appropriate land uses for the area, taking into account its proximity to the airport and the overall economic objectives of the County (Tr, 9/28/01, p 30-38, Apx 602a).

²Mr. Prochaska has an impressive background in land use planning and development in both the public and private sectors. He testified that approximately 99% of his time since 1997 has been spent planning and developing the Pinnacle Project (Tr, 9/28/01, p 5-8, Apx 577a).

Second, the County attempted to determine how appropriate infrastructure, including utilities, could be placed in order to satisfy capacity requirements for proposed land uses. *Id.* Finally, the County attempted to assemble the remaining land, initially through negotiated purchases and eventually through eminent domain (Tr, 9/28/01, p 18-22, Apx 590a).

As the project began to coalesce, the County hired Smith Group JJR (“JJR”), a nationally renowned land use planning firm. JJR, in conjunction with County officials, engaged in an extensive land use planning exercise that went through approximately 60 different iterations before the current plan was developed. The issues addressed in this process included traffic patterns, land utilization, project size and related issues. Eventually, a working plan was formalized (Tr, 9/28/01, p 30-42, Apx 602a). This plan was discussed in detail with the two local communities, both of which provided input, and was eventually submitted to the County Commission again when the Resolution of Necessity was passed. *Id.* While the plan has continued to evolve based upon additional work by JJR and input from local communities, its integrity and basic project objectives have remained the same since early in the planning process. *Id.* The land use map prepared by JJR has definite boundaries, defined land uses and interior road patterns (Land Use Map, Trial Exhibit No. 11, Apx 365b). Prochaska testified that, while they continue to work with the local communities in a cooperative manner, it is anticipated that the Pinnacle Project will go forward in a manner consistent with the current plan. *Id.*

As part of the comprehensive planning process, the County undertook extensive investigatory activities at the site. A detailed traffic study was performed and topographical studies were completed (Tr, 11/1/01, p 164, Apx 890a). The County addressed environmental issues through a general environmental assessment of the entire project area (Tr, 11/1/01, p 165-66, Apx 891a). An additional Phase I Environmental Study was completed on each of the properties to be acquired

through eminent domain. *Id.* A wetland analysis was performed and a mitigation plan has been put in place. *Id.* Also, as explained by Prochaska, the County has dealt in a cooperative manner with the United States Fish and Wildlife Division with respect to developing a plan for endangered species (Tr,11/1/01, p 166, Apx 892a).

The County verified that it will provide the appropriate infrastructure to accommodate the land use goals for this project. For instance, the County commissioned an engineering/utility study and used it to authorize preparation of final utility construction drawings (Tr,11/1/01, p 164-65, Apx 890a). As part of resolving these same types of capacity issues, the County has engaged in a careful analysis of difficult storm water runoff issues, which Prochaska confirmed have been resolved (Tr, 11/1/01, p 167, Apx 893a).

Even those tasks that remain, including obtaining a categorical exclusion from the FAA, completing zoning, obtaining wetland permits from the MDEQ and negotiating an inter-local agreement, have been analyzed and are on the verge of being resolved. Prochaska confirmed that resolution of these issues will be finalized just as soon as the County finishes assembling the land, which depends on these takings. In any event, he stated that these issues would not be impediments to successful completion of the project (Tr, 9/28/01, p 36-39, Apx 608a). The County's investment to date provides a real and powerful incentive to complete the Pinnacle Project. The trial court agreed, stating:

The court agrees with the position of the County that the only remaining impediment to finalization of the various regulatory approvals is the completion of the County's acquisition. In other words, as much as possible, the County has progressed sufficiently down the regulatory approval path for this Court to determine that the lack of finalization does not render the plans of the County for the development of the Project uncertain or speculative. [Opinion, p 18, Apx 934a.]

Given these facts, it is preposterous for the Defendants to argue that there is no plan in place for this project. In *City of Detroit v Lucas*, 180 Mich App 47; 446 NW2d 596 (1989), the Court of Appeals addressed an identical argument to that being raised by the Defendants. The court rejected the argument, stating that “[m]inute details of the plan need not be shown.” *Id.* at 54. Instead, it is enough that the property is part of the planned area. *Id.* The Court of Appeals used similar reasoning to reject Defendants’ argument that the plan for the Pinnacle Project is speculative, declaring the attack to be “specious” because the Pinnacle Project cannot be finished until the takings are accomplished even though its boundaries and other details have already been determined (Appeals Opinion, p 8, Apx 984a).

Defendants also contend that, because there is not a specific, identifiable end user in place, the project is speculative. All of the testimony on this subject confirmed the wisdom of the County Commission’s decision to authorize the taking of this property. Dr. John Kasarda, the leading worldwide expert in the area of airport-related economic development, unwaveringly testified to the strong demand for the Pinnacle Project adjacent to Metropolitan Airport (Tr, 9/26/01, p 54-55, Apx 122b). Likewise, Steven Bradford of Trammel Crow, invests money in these projects and has regular opportunities to scrutinize airport-related development projects in order to determine their viability (Tr, 9/27/01, p 6-9, Apx 136b). In his opinion, the Pinnacle Project, as designed, will generate a “very, very strong” demand (Tr, 9/27/01, p 28-29, Apx 158b).³ There are probably no

³Dr. Kasarda is the Institute Director of the Kenan Institute of Private Enterprise at The University of North Carolina, Chapel Hill. He is a world-renowned expert in the field of airport-related development. Dr. Kasarda advises national governments from around the world, the World Bank and multiple states and cities on airport-related development. Notably, Dr. Kasarda had never testified as an expert prior to this case. His extraordinary resume has been made part of the County’s Appendix at page 336b. Mr. Bradford is the Vice President of Airport Service at Trammell Crow Company, one of the largest and most prestigious real estate developers in the world (Tr, 9/27/01, p 6-9, Apx 136b).

two individuals in this country more uniquely qualified to address whether there is sufficient demand for the Pinnacle Project and whether it will be successful and the County's contemplated benefits realized. Both Dr. Kasarda and Bradford echoed the County's optimism and confirmed that the economic benefits sought by the County will be realized. Furthermore, Wayne Doran, who is a member of the Airport Commission and is intimately familiar with the social, political and economic climate of this region, confirmed the strong demand (Tr, 9/26/01, p 122, Apx 548a).

Testimony was unequivocal that a tremendous amount of planning work was completed for the Pinnacle Project. The Project is sufficiently concrete to avoid any argument that the County Commission abused its discretion in authorizing eminent domain proceedings to complete the land assemblage. In light of the overwhelming evidence, the Court of Appeals did not commit "clear error" in affirming the lower court.

C. These Takings Are Necessary For The Completion Of The Pinnacle Project And Do Not Amount To Landbanking

Michigan Courts have traditionally held that a taking is "necessary" if the land condemned is needed now or in the near future. *Grand Rapids Board of Education v Baczewski*, 340 Mich 265; 65 NW2d 810 (1954). On the basis of the evidence presented, the trial court determined that "plans for the immediate or nearly immediate future use of the properties are in place," thereby supporting the County's declaration of necessity (Opinion, p 20, Apx 936a). Defendants, however, continue to assert that the County is attempting to "stockpile" or "landbank" their properties for some distant use. In support of this argument, the Defendants cite two cases, neither of which is applicable to this case.

In *Baczewski, supra*, the City of Grand Rapids proposed to condemn property to build a school. The trial court record, however, demonstrated that the city did not intend to begin

construction until the existing school had outlived its usefulness. Planning officials admitted that there was “no present need” for a new school. *Id.* at 268. The testimony established that the current high school was adequate to meet local needs for 30 years. This Court properly concluded that condemnation proceedings had been instituted “long before there was a need for a new high school site” *Id.*

Defendants also rely on *Barnard, supra*, a case very similar to *Baczewski*. In *Barnard*, the city planned to construct a five foot-wide sidewalk, but the proposed condemnation was for an additional 44 acres. The city maintained that the extra acreage was necessary both for safety purposes and for the eventual widening of the road. The court concluded that where no safety study had been done, the safety rationale was unsupportable on the record. The court went on to find that the acquisition of the excess property was actually “premised on the hope that [Troy] might widen Square Lake Road sometime within the next 30 years” *Id.* at 572. The court held that this was an abuse of discretion by the condemning agency under these facts.

The record established in this case is in stark contrast to the facts of *Baczewski* and *Barnard*. Indeed, the trial court addressed and rejected this land banking argument:

The record adduced in our case convinces this court that the present condemnation proceedings are factually dissimilar to the *Baczewski* and *Barnard* cases. First, per the testimony of Mr. Prochaska, there are plans to immediately begin construction activities that will affect each parcel in the project area. For example, the County plans to let out bids for the construction of the utilities to serve the project area within months, with actual work on the utility portion of the Project projected to commence by the spring of 2002. Additionally, in the spring of 2002, the storm water project will be commenced. Final plans for road improvements have also been completed and the Vining Road installation scheduled to begin in Summer 2002.

Thus, unlike the *Baczewski* and *Barnard* cases, plans for the immediate or nearly immediate future use of the properties are in place. [Opinion, p 20, Apx 936a.]

The County's determination that these parcels are necessary for immediate use in the Pinnacle Project is binding on the Court absent a showing of abuse of discretion. The record easily refutes any such claim of abuse and directly supports the trial court's findings in this regard. Therefore, the lower courts did not commit clear error.

III. THE TRIAL COURT AND COURT OF APPEALS CORRECTLY CONCLUDED THAT THE COUNTY'S PROPOSED TAKING IS PROPER BECAUSE IT SERVES A CLEAR AND SIGNIFICANT PUBLIC PURPOSE THAT PREDOMINATES OVER ANY PRIVATE BENEFIT

At the heart of this dispute is whether the County's proposed project serves a public purpose. After 10 days of testimony and argument the trial court sustained the County's taking of these parcels, stating that "the record reflects that the public purpose to be served by the takings involved in these cases will significantly and clearly inure to the public's benefit" (Opinion, p 35, Apx 951a) (emphasis added). The Court of Appeals concurred holding, pursuant to the heightened scrutiny test set forth in *Poletown, supra*, "that the Pinnacle Project serves a public purpose that predominates over any incidental private benefit" (Appeals Opinion, p. 8, Apx 984a).

A. Standard Of Review

A trial court's factual findings on necessity and public purpose will not be reversed on appeal unless they are clearly erroneous. *City of Troy v Barnard, supra*; *Nelson Drainage District v Filippis, supra*; *Livingston County Road Commissioner v Herbst, supra*.

B. The Public Purpose Test

Michigan's condemnation jurisprudence has often considered when and how municipalities may take private property for public use or purpose. In *Poletown Neighborhood Council v City of Detroit*, 410 Mich 616; 304 NW2d 455 (1981), the City of Detroit condemned a large tract of land in downtown Detroit to convey the assembled parcel to General Motors Corporation ("GM") as a

site for construction of an assembly plant. This Court was presented with the question of whether the use of eminent domain by the City of Detroit constituted a taking of private property for a private use, thereby contravening both the state and the federal constitutions. *Id.* at 628.

Mindful that “when the legislature speaks, the public interest has been declared in terms well-nigh conclusive,” the *Poletown* Court balanced the deference historically shown to such declarations and the mandate of the Constitution that private property may only be taken for a public use. *Poletown, supra* at 632-633, citing *Berman v Parker*, 348 US 26, 32; 75 SCt 98; 99 L Ed 27 (1954). The Court remained cognizant that, as the *Swan* Court noted over a century ago, the “government must adapt itself to the existing condition and wants of society, or its efficiency is destroyed.” *Swan, supra* at 438.

In *Poletown*, the defendants argued that, while there may be some incidental public benefits attributable to the project, because the land was being assembled to GM’s specifications, for immediate conveyance to GM, for uncontrolled use by GM and for GM’s profit, the taking was really for a private use, with GM being the primary beneficiary. *Id.* at 631-32. The city countered this argument by pointing to the immense public benefits that were expected to flow from the proposed development as being the primary purpose for the condemnation, with any benefit to GM being incidental. This Court noted that the “heart of the dispute” was whether the primary beneficiary of the proposed condemnation was the public or private interest and enunciated the following rule:

Where, as here, the condemnation power is exercised in a way that benefits specific and identifiable private interests, a court inspects with heightened scrutiny the claim that the public interest is the predominant interest being advanced. [*Id.* at 634.]

After applying heightened scrutiny, this Court found that the city’s “controlling public purpose” – the taking of property for the creation of an industrial site, which would be used to alleviate and

prevent conditions of unemployment and fiscal distress in the Detroit area – was, indeed, a public purpose. Further, the Court determined that the ultimate conveyance of the assembled parcel to a private manufacturer did not defeat this “predominant public purpose.” *Id.* at 632. Citing Justice Cooley, this Court stated: “the most important consideration in the case of eminent domain is the necessity of accomplishing some public good which is otherwise impracticable...the law does not so much regard the means as the need.” *Id.* at 633, citing *People ex rel Detroit & Howell R Co*, *supra*.

C. Following *Poletown*, Eminent Domain Jurisprudence Developed A Spectrum Of Public Purpose Cases In Which Only Those Projects That Sufficiently Advance Public Interests Are Allowed To Proceed

Since *Poletown*, Michigan courts have attempted to discern the proper role of “specific and identifiable” private interests in eminent domain proceedings initiated by public authorities. There can be no dispute that condemnation for a public use or purpose is permitted, while condemnation for a private use or purpose is forbidden. *Poletown*, *supra* at 631. A distinction must be made, however, between condemnation that is *for* a private use or purpose and condemnation that merely provides some benefits to a private entity. Nearly any condemnation by a public body stands to benefit some private entity. For example, when a municipality condemns land to build a school, a fire station or a post office, the municipality contracts for the services of private companies to actually construct the dwelling. Any such private company will obviously benefit financially from the development of the project. Similarly the laying down and widening of roads and intersections undoubtedly provides benefits, sometimes substantially so, to the private companies and individuals located in their vicinity. In these situations it would be disingenuous to label such projects as private.

What now exists is a wide spectrum of decisions in which private gain is weighed against public benefit to determine whether a requisite public purpose exists. At one end of the spectrum are cases where the court invalidated takings, because the primary beneficiary was a private entity. On the other end of the spectrum are cases in which the court determined that a primarily public interest was being advanced, regardless of any incidental private gain. These cases point to a number of factors that are relevant to a determination that public purpose exists, including: (1) whether there is a specific and identifiable private interest; (2) whether the municipality or the private interest initiated the project; (3) the level of involvement of this private interest in the acquisition process; (4) the extent of the public benefit; (5) the extent of the private benefit; (6) the level of control that the condemning authority will retain after condemnation; and (7) the degree of public use of the finished project.

1. A Condemning Authority May Not Wield Its Power Of Eminent Domain As An Agent For Private Interests

The Court of Appeals took up the issue of public purpose for the first time since *Poletown* in *City of Center Line v Chmelko*, 164 Mich App 251; 416 NW2d 401, 402 (1987). In *Chmelko*, a local company, Rinke Toyota, attempted to purchase property from its neighbor in order to expand its business. After the private transaction was unsuccessful, the same property was ultimately condemned by the City of Center Line at Rinke's request, purportedly to eliminate parking shortages and non-conforming zoning uses. The Court of Appeals determined that the city's actual motivation for the condemnation was a threat issued by Rinke Toyota that it would move its business center outside of Center Line if the city could not acquire the property needed for its expansion. Importantly, Center Line accepted the offer of Rinke to financially underwrite all of the city's costs in prosecution of eminent domain proceedings, including court costs, attorney fees, appraisal and survey costs. Although the city claimed that this private funding did not alter the significance of the

public purpose behind the taking, the Court saw through this ruse, finding that the City's claimed public purposes of eliminating nonconforming uses, creating adequate parking and eliminating blight were unsupported by factual evidence. *Id.*

In *Chmelko*, the court reaffirmed that where a condemning authority intends to benefit a private interest through use of its power of eminent domain, the condemnation cannot stand. *Id.* at 259. There, the court stated that it "did not interpret *Poletown* to mean that whenever a substantial corporate enterprise needs room to expand it can threaten to move and then use that threat, even if real, as leverage to induce the local government to destroy smaller interests." *Id.* at 264.

2. This Court Revisited And Reaffirmed The *Poletown* Public Purpose Analysis In *Edward Rose*

This Court revisited the public purpose issue in *City of Lansing v Edward Rose Realty*, 442 Mich 626; 502 NW2d 638 (1993). In that case, the City of Lansing entered into a franchise agreement with Continental Cablevision enabling Continental to provide cable television service to Lansing's apartment residents. The city adopted ordinances (proposed by Continental) prohibiting apartment building owners from interfering with residents' access to cable service. Under these ordinances, if an apartment owner refused access to Continental, upon request by Continental, the city could commence eminent domain proceedings to acquire the easements needed to provide the cable service. Much like the facts in *Chmelko*, Continental was responsible for indemnifying the city for all expenses and costs incurred in commencing and prosecuting the eminent domain proceedings. *Id.* at 629.

The Court found that because Continental Cable was a "specific and identifiable interest" and would receive more than an "incidental benefit" from the institution of condemnation proceedings, application of the heightened scrutiny standard enunciated in *Poletown* was appropriate. Thus, the Court analyzed whether the benefit to the public was "clear and significant" and was not

predominated by the interest of Continental Cable. *Id.* at 639. The Court determined that the asserted public benefits were not furthered by the city's ordinances and that benefits to Continental predominated over the purported public benefits. *Id.* at 644.

This Court in *Edward Rose* was appropriately troubled by Continental Cable controlling the eminent domain process by virtue of paying for the acquisition. Also, the benefit to Continental Cable of expanding its business interest outweighed the marginal public benefit of having a few residents receive cable service from this company.

3. The City Of Detroit's Downtown Development Authority's Condemnation Is Upheld For The Creation Of Detroit's "Theatre District"

In another eminent domain case that illuminates the post-*Poletown* spectrum, the City of Detroit's exercise of the power of eminent domain was authorized by the Court of Appeals. In *City of Detroit v Lucas*, 180 Mich App 47; 446 NW2d 596 (1989), the City of Detroit acquired private property for parking and related amenities associated with development of the Fox Theatre District. The property owners challenged the taking arguing that it was an abuse of discretion for the city to acquire private property to benefit the owners of the Fox Theater. In *Lucas*, the court reiterated the concept from *Poletown* that "the term 'public use' has not received a narrow or inelastic construction." *Id.* at 51. While the Court of Appeals sustained the taking based upon the owners' failure to properly perfect their appeal, the court went on to note that, even absent these procedural obstacles, the taking would have been permitted.

Absent the taking authorized by the court in *Lucas*, the Fox Theater Project, in all likelihood, would not have occurred. The Court of Appeals properly afforded discretion to the condemning agency to bring that project to fruition. The public/private partnership between the City of Detroit

(through its Downtown Development Authority) and the owners of the Fox Theater have converted a decimated area of the City of Detroit into a vibrant social area that has served as an engine for additional economic growth in that area of the city.

4. Michigan Statutes That Allow Condemnation Of Private Lands For A Private Purpose Are Unconstitutional

Recently this Court again took up the issue of public purpose in *Tolksdorf v Griffith*, 464 Mich 1; 626 NW2d 163 (2001), where it reviewed the constitutionality of the Opening of Private Roads and Temporary Highways Act, a statute that allowed private individuals to open private roads over another landowner's property. *Id.* Although this was not a condemnation statute as such, the Court found that it amounted to a taking and then found it unconstitutional. The Court applied the heightened scrutiny analysis advanced by *Poletown*. Finding that this taking would benefit a "specific and identifiable private interest," i.e. the private landowner requesting access, the Court stated that "[t]he taking authorized by the act appears merely to be an attempt by a private entity to use the state's powers 'to acquire what it could not get through arm's length negotiations with defendants.'" *Id.*, citing *Edward Rose, supra* at 558. The Court summarized by acknowledging that the Open Road Act serves predominantly a private purpose, but even more so that "any benefit to the public at large is purely incidental and far too attenuated to support a constitutional taking of private property." *Id.* at 8-9. Also integral to the Court's analysis in *Tolksdorf* is that the state was not compensating the landowner for the taken property, but instead, the private person obtaining the private road was responsible for paying the dispossessed landowner. *Id.*

5. A Municipality Is Restricted From Condemning Private Property For The Purpose Of Building A Road That Will Serve Primarily Private Interests

Most recently, the public purpose issue was reviewed in *City of Novi v Robert Adell Children's Funded Trust*, 253 Mich App 330, 659 NW2d 615 (2002) (Application for Leave

pending). In *Adell*, the City of Novi, in an attempt to alleviate traffic construction, brought a condemnation action to construct two roads. The first was a “Ring Road” that would form a ring around the congested intersection and the second was an industrial spur, to be called A.E. Wisne Drive, which would connect the Ring Road to a private company, A.E. Wisne’s, landlocked property. The defendant landowners challenged both the public purpose and the necessity of the proposed taking. The Court of Appeals rejected the city’s argument that because A.E. Wisne Drive was to be a “public” road that it necessarily served a public purpose and determined the purpose behind the condemnation was to confer a benefit to A.E. Wisne, thus the taking was proscribed by law, as the benefit to private interests predominated over the purported benefits to the public. *Id.* at 353.⁴

6. Several Out-Of-State Cases With Indistinguishable Factual Backgrounds Support These Takings

Although Michigan courts have not directly addressed the precise factual scenario before this Court, there is a Maryland case that is directly on point. Under circumstances strikingly similar to the Pinnacle Project, the Maryland appellate court held that proposed condemnation for the “development of a multi-industry employment center or industrial park constitutes the requisite public use so as to justify the County’s exercise of the eminent domain power.” *Prince George’s County v Collington Crossroads, Inc.*, 275 MD 171, 172; 339 A2d 278, 279 (1975)(Attached at Apx 352b). The planned technology/industrial park in Prince George’s County was meant to secure “research and development and other clean industrial types” that the county had experienced difficulty in attracting. In much the same way as Wayne County proceeded in developing a plan for

⁴It is interesting to note that Court of Appeals Judge O’Connell sat on both the *Adell Trust* panel and the panel for the case at bar. Judge O’Connell voted in *Adell Trust* to invalidate the City of Novi’s taking, but voted in the case at bar to uphold the County’s taking for the Pinnacle Project. This demonstrates that *Poletown*’s heightened scrutiny test is being applied on a case by case basis.

the Pinnacle Project, Prince George's County formulated a comprehensive plan for development of their technology/industrial park. The plan called for assemblage of 1,690 acres, 930 of which were already owned by the county. Prince George's County expected unique beneficial effects to result from development of the park, including new job opportunities for county residents and new taxable rateables.

Rejecting a challenge by a parcel owner that the taking was for a private rather than a public use, the court held that the use was a public one and emphasized two factors: (1) a finding by the county that this type of industrial park was necessary for the economic well-being of the county, but would be too costly for private developers to carry out; and (2) the county's plan to maintain significant control over the industrial park after the commercial land was sold to private owners. *Id.* at 179. The court also found it significant that 20% of the industrial park site would be preserved as permanent public or private open space, including a golf course. *Id.* In addition, the court noted that although the land would eventually be sold off to private entities, there had been no suggestion that the purpose of the county's action was to benefit any particular private businesses or persons. *Id.* at 190.

Prince George's County is factually indistinguishable from the case at bar. Additionally, cases in other jurisdictions have authorized taking under similar factual scenarios as those presented by the Pinnacle Project. See generally, *City of Minneapolis v Wurtele*, 291 NW2d 386 (Minn, 1980)(sustaining the condemnation of private lands to develop a retail/hotel-office space project); *Northeast Parent and Child Society, Inc v City of Schenectady Industrial Development Agency*, 114 AD2d 741; 491 NYS2d 503 (1985) (approving the taking of a former school site to establish an industrial site as a permissible public use); *The Petition of the Port of Graves Harbor for the*

Acquisition by Condemnation of Additional Lands, 30 Wash App 855; 638 P2d 633 (1982)(upholding the taking of private river front property to be eventually developed as industrial sites).

D. The Pinnacle Project Will Create Tremendous Benefits For The Public

In July 2000, Wayne County adopted the Resolution of Necessity, thereby declaring it necessary to acquire the subject parcels to advance the following public purposes, among others: (1) to create jobs for all segments of the work force; (2) to diversify investment and business opportunities; (3) to stimulate private investment and redevelopment in the County to insure a healthy and growing tax base so that the County can fund and deliver other critical public services; (4) to support development opportunities that would otherwise remain unrealized; and (5) to develop public recreational facilities and open use lands (Resolution of Necessity; Apx 522b).

Before voting on the Resolution of Necessity, the County commissioned three studies to determine whether its vision would be realized. The experts who conducted these studies examined the project and the surrounding socioeconomic condition, and provided their analyses of the potential public benefits of the Pinnacle Project (Tr, 9/24/01, p 33, Apx 33b). The County contracted with the Economic Research Associates to conduct a Market/Marketability Analysis for the Detroit Metro Area (“ERA Study”) (Tr, 9/24/01, p 33, Apx 33b). The ERA Study predicts that some 18,215 new jobs will be created at total build out of the park (Trial Exhibit No. 5, Apx 382b).

The County then commissioned the Woodward Companies to prepare a Direct Economic Benefit Analysis for the Pinnacle Project (“Woodward Study”) (Tr, 11/1/01, p 162, Apx 888a). The Woodward Study predicts public benefits to be generated during the construction of the park, including the creation of nearly 14,000 jobs, \$545 million in wages and salaries, over \$20 million

in personal income tax, and \$32 million in resultant sales taxes collected on construction material purchased within Michigan. In addition, public benefits related to post-construction occupancy and operations include the creation of nearly 25,000 jobs, \$534 million in wages and salaries, 17.6 million in annual income tax, and \$42 million in annual property taxes generated for the local communities (Trial Exhibit No. 33, Apx 366b).

The County also contracted with Ernst & Young to study the economic benefits to be created by the Pinnacle Project ("E&Y Study") (Tr, 9/24/01, p 33, Apx 33b). The E&Y Study buttressed the County's view that the Pinnacle Project will produce considerable economic benefits, especially because it adopted a conservative view. Among other positive forecasts, the E&Y Study estimates that the Pinnacle Project will generate a future value in excess of approximately \$350 million in gross total receipt of land sales (Trial Exhibit No. 6, Apx 470b). Dr. Kasarda and Bradford testified that communities such as North Carolina, Dallas/Fort Worth, and others have seen explosive economic growth when first-class, master planned projects are implemented in close proximity to major airports (Tr, 9/26/01, p 35-39, Apx 103b; Tr, 9/27/01, p 40-43, Apx 170b).

The best evidence of public benefit is the overwhelming and undeniable support that this project has generated from the business, political and educational communities in Michigan. The Airport Commission, of which a County witness, Mr. Wayne Doran, is a member, is comprised of business leaders throughout the region. As Doran testified, the Commission's goal is to make Wayne County a better place to live, thereby enabling the County to attract jobs and other economic investment to the region from throughout the United States and the world (Tr, 9/26/01, p 120-122, Apx 548a). Doran testified that the Commission strongly endorses this project and its goal of helping transform the image of Wayne County from a rust belt region to a diversified economic area,

thereby protecting local residents from the vagaries of economic fluctuations in automotive and manufacturing industries. He explained that the Pinnacle Project will enable Wayne County to compete on a worldwide basis for economic investment and the jobs that naturally accompany such investment (Tr, 9/26/01, p 124-126, Apx 550a).

Letters of support were introduced at trial from a wide range of interests, including University of Michigan, the Downriver Community Conference, Michigan Virtual University, Southern Wayne County Chamber of Commerce, Detroit Regional Chamber of Commerce, Lester Robinson, Director of Airports, and Prechter Holdings (Trial Exhibit No. 8, Apx 539b). This Project has received broad based support across the political spectrum. The MEDC, whose chairman, Doug Rothwell, was appointed by former Governor Engler, has enthusiastically joined Wayne County as a partner in this project, expanding the initial \$10 million investment of state funds to an anticipated \$50 million as the Project proceeds (Tr, 9/24/01, p 39-42, Apx 39b).

The testimony on the public benefit issue was uniform, consistent and unrefuted. In addition to bringing new job sectors to the area, thereby broadening the economic base of the County, the indirect benefit of enhancing the County's image will allow the County to compete with other cities in an effort to attract jobs and tax base well into the 21st century (Tr, 9/24/01, p 54-55, Apx 54b; Tr, 9/26/01, p 121, Apx 547a; Tr, 9/26/01, p 30-35, Apx 98b; Tr, 9/27/01, p 34-35, 45, Apx 65b). These effects will benefit the entire region for years to come.

This evidence directly supports the trial court's finding that "completion of the Project would enable the County to create a unique environment that would attract business opportunities for the community which could not be readily replicated elsewhere" (Opinion, p 34, Apx 950a). In light of the extensive evidence presented to the trial court, it did not commit "clear error" in determining that clear and significant public benefits that will be created by the Pinnacle Project.

E. The Pinnacle Project Belongs On The Constitutional End Of The Public Purpose Spectrum

After two decades of public purpose jurisprudence, a wide spectrum exists. At one end are *Center Line* and *Edward Rose*, where the private interest conceived, initiated and funded the project. In each of the cases, the end user was directing the acquisition process in important respects. The *Tolksdorf* and *Adell Trust* cases are perhaps somewhat less objectionable, but still, they represent attempts “by a private entity to use the state’s power to acquire what it could not get through arm’s length negotiations with defendants.” *Tolksdorf, supra* at 10. In each of these cases the benefit to the public was very narrow, while a private interest would reap great benefits. Near the middle of the spectrum is *Poletown*. While GM chose the site and stood to benefit from the condemnation, the Court was persuaded by the significant public benefits that inured to the city. Moreover, the City of Detroit bore the expense of and controlled the acquisition in *Poletown*.

Further down the spectrum are *Lucas, Prince George’s County* and the Pinnacle Project, which stand in direct contrast to the factual scenarios of the aforementioned cases. The Pinnacle Project, much like *Prince George’s County*, does not have a “specific and identifiable” private interest, as such, who is contributing to land preparation or acquisition costs or otherwise controlling or influencing the County. The County conceived this Project, chose the site location for the Project and identified types of uses for all areas within the Project boundaries. There is no private interest that is involved in setting the boundaries, allocating land use resources or otherwise dictating how this Project will proceed. In fact, the Defendants have at no time claimed that the County is intending to benefit any specific private interests through the acquisitions of their parcels. The trial court found this persuasive, stating that “[u]nlike *Chmelko, Edward Rose* and *Tolksdorf*, there is no basis for concluding that the County is acting as the tool of a private party who cannot otherwise obtain desirable property through arm’s length transactions (Opinion, p 30, Apx 946a). The Court

of Appeals agreed, noting that “plaintiff does not have the primary intention to confer a private use or benefit with the taking at issue” (Appeals Opinion, p 9, Apx 985a).

Indeed, testimony at trial was unequivocal that the Smart Park board, in conjunction with local zoning officials, will decide which end users will be permitted to participate in this Project and under what terms. This will only be done after careful consideration of whether these end users fit within the County’s contemplated view of this Project and whether such end users will advance the public goals and objectives for Pinnacle Project set by the County Commission (Tr, 9/24/01, p 50-51, Apx 50b). Thus, the County and, through its Commission, the citizenry will retain control of this land.

While the Defendants argue that the lack of an identified end user renders the project speculative, in fact, it is precisely this fact that demonstrates the public, as opposed to private, nature of the Project. The fact that a private party may ultimately earn a profit if it is permitted to participate in the Pinnacle Project, is clearly incidental to the significant public benefits. After engaging in a lengthy discussion of this applicable case law, the trial court determined that, under the heightened scrutiny standard, the public benefits created by the Pinnacle Project predominate over any private interest. In doing so, it stated:

On this latter issue, unlike the foregoing cases, in the present condemnation actions, the land sought by the County that will be sold to private parties would be integrated into a general land use plan that contemplates public uses, such as golf courses, bike paths, and open spaces. See Tr. 11-14-01, p. 26. The facts before the Court, therefore, do not suggest that the condemnation action was meant to benefit a narrow private interest as in *Chmelko*, *Edward Rose* and *Tolksdorf*. Instead the private parties, whoever they may be, who do purchase the land from the County after the conclusion of these proceedings and after the County has made the improvement to the utilities, storm sewers and roads and has otherwise prepared the land for use, will be in roughly the same position as other private parties who incidentally benefit from such improvements. [Opinion, p 30-31, Apx 946a.]

Likewise, the Court of Appeals held that the County “provided substantial proof that the public is primarily to be benefited” (Appeals Opinion, p. 11, Apx 987a). Based on the preceding analysis, it is apparent that the Pinnacle Project is well within the spectrum of projects that have been deemed acceptable by *Poletown* and its progeny.

IV. *POLETOWN’S “PUBLIC PURPOSE TEST” IS CONSISTENT WITH ARTICLE 10, §2 OF THE 1963 MICHIGAN CONSTITUTION*

Article 10, §2 of the Michigan Constitution states that “private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law.” At issue in this case is the meaning of the term “public use.” In *Poletown* this Court interpreted this language “as requiring that the power of eminent domain not be invoked except to further a public use or purpose.” *Poletown, supra* at 629. As the County explains below, *Poletown’s* interpretation of this provision is consistent with the meaning of “public use” that the People intended when they adopted the Constitution in 1963, as well as precedent spanning back to this state’s beginnings.

A. Standard Of Review

Whether *Poletown* and its “public purpose” test are consistent with the Michigan Constitution is a question of law subject to de novo review by this Court. *Tolksdorf, supra* at 5; *People v Dunbar*, 463 Mich 606, 615; 625 NW2d 1 (2001); *Blank v Dep’t of Corrections*, 462 Mich 103, 112; 611 NW2d 530 (2000).

B. The Rules Of Constitutional Construction

The primary goal in construing a constitutional provision is “to give effect to the *intent of the people* of the state of Michigan who ratified the constitution, by applying the rule of ‘common understanding.’” *Michigan United Conservation Clubs v Secretary of State*, 464 Mich 359, 373; 630 NW2d 297 (2001); see also *Lapeer County Clerk v Lapeer Circuit Court*, 469 Mich 146, 155; 655

NW2d 452 (2003); *Straus v Governor*, 459 Mich 526, 532; 592 NW2d 53 (1999). The doctrine of “common understanding” is, at base, a “search for the original meaning attributed to the words of the constitution,” and it is the goal of courts to examine “contextual clues about what meaning the people who ratified the text in 1963 gave to it.” *Michigan United Conservation Clubs*, *supra* at 374-375. In its search for the “common understanding,” it is proper for this Court to review available historical evidence. *Id.* at 377, fn 9. It is, then, not only the text of the Constitution itself which drives the common understanding analysis, but also the historical backdrop in which the People adopted the provisions.

Over 100 years of Michigan eminent domain jurisprudence existed before the 1963 Constitution was adopted. Further, the Michigan Legislature had enacted dozens of statutes authorizing public bodies to condemn private property for various purposes. Also, the federal Constitution, like the Michigan Constitution contains a takings clause, which provides: “nor shall private property be taken for public use, without just compensation.” US Const, Am V. It is proper for this Court to look to interpretations of the Fifth Amendment for guidance in determining the meaning of the Michigan provision. See generally *Victorson v Dep't of Treasury*, 439 Mich 131; 482 NW2d 685 (1992); *People v Collins*, 438 Mich 8; 475 NW2d 684 (1991). In the takings context, this Court has cited both the Fifth Amendment and Article 10, §2 of the Michigan Constitution, without addressing what differences, if any, exist between the two provisions. See generally *Adams Outdoor Advertising v City of East Lansing*, 463 Mich 17; 614 NW2d 634 (2000); *K&K Construction, Inc v Department of Natural Resources*, 456 Mich 570; 575 NW2d 531 (1998). Indeed, in *K&K Construction*, this Court’s discussion and application of the law in the regulatory takings context relied solely upon United States Supreme Court Fifth Amendment Jurisprudence.

C. A Historical And Textual Analysis Demonstrates That The Public Use Requirement Is Satisfied Where The Public Will Benefit From The Taking

Throughout the history of America, private property has been taken by the government. Use of eminent domain during colonial times, while modest by current standards, highlights two important trends. First, property was taken to promote economic growth of the society as a whole. Second, legislatures delegated the power to condemn to private entrepreneurs, like mills and iron works operators, whose activities were seen as benefiting society. Ely, *Can the “Despotic Power” Be Tamed? Reconsidering the Public Use Limitation on Eminent Domain*, 17-Dec Prob. & Prop. 31 (2003). After the revolution, states used eminent domain for far more extensive projects. *Id.*

In Michigan, as early as 1852, the Supreme Court was grappling with how to define “public use.” In *Swan, supra*, the high Court reviewed the constitutionality of acts allowing railroad corporations to take private property for the construction of “their roads.” *Swan* at 427. In holding that such a taking was for a public use, the Court observed that the purpose designed by the government is the “expeditious communication and transit from point to point, and not revenue. It would not be contended for a moment that private property could be taken to be used for the latter purpose.” *Id.* It was this public purpose that drove the Court’s analysis, leading it to the conclusion that while the railroad operators would benefit tremendously from the construction of their road, the private benefit was not the reason for the taking, but instead, “the reward springing from the source.”

The Court stated:

If this be not the correct view, then we confess we are unable to find any authority in the government to accomplish any work of public utility through any private medium, or by delegated authority; yet all past history tells us that governments have more frequently effected these purposes through the aid of companies and corporations than by their immediate agents, and all experience tells us that this is the most wise and economical method of securing these improvements. [*Id.* at 436].

The Court explicitly recognized that such public/private takings may be used to effect legitimate public purposes regardless of whether private interests stood to benefit through private ownership and use of the property after it was taken.

The *Swan* Court also noted that “it rests in the wisdom of the legislature to determine when, and in what manner, the public necessities require its exercise, and with the reasonableness of the exercise of that discretion Courts will not interfere.” *Id.* at 438. The judiciary affords such deference to elected officials to determine these necessities because:

These necessities change with the progress of society. That which would have satisfied the public demands a few years since, may perhaps now be wholly inadequate or useless. As new discoveries are made in science and adapted by art to the uses and wants of community, and its ever-changing conditions, laws must adapt themselves to the existing state of things, not arbitrarily, but by natural gradations....government must adapt itself to the existing condition and wants of society, or its efficiency is destroyed. [*Id.*]

Some 80 years later the Supreme Court revisited the public use issue and held constitutional a state statute empowering bridge companies to condemn land. *Detroit International Bridge Company v American Seed Company*, 249 Mich 289; 228 NW 791 (1930). Although the land would be owned and used by a private entity that would make financial profit from the collection of tolls, the Court found that the condemnation was for a public use. The Court was persuaded that the state would retain some control in the operation of the bridge as a result of the Secretary of War’s power to supervise tolls and determine their reasonableness pursuant to federal statute. *Id.* at 299.

In *Lakehead Pipe Line Company v Dehn*, 340 Mich 25; 64 NW2d 90 (1954), the Court determined that the construction and operation of an oil pipe line was a public use sufficient to support the use of eminent domain. In its analysis, the Supreme Court was cognizant that the oil company would benefit from the ownership, installation, and use of the pipe line; however, such private benefit was found not to transform the purpose of the taking from public to private. *Id.* at

41. Notably, the Court found that any private benefits were “merely incidental to the main purpose.”

Id.

The Supreme Court reaffirmed the proposition that a taking for a public use will not be defeated by the “mere fact that an incidental private benefit or use of some portion of such property will result” in *In re Slum Clearance in City of Detroit*, 331 Mich 714, 721-722; 50 NW2d 340 (1951). At issue in *Slum Clearance* was the constitutionality of a statute allowing condemnation for the purpose of removing blighted areas for economic redevelopment, with eventual sale of the taken property to private entities with the hope of encouraging redevelopment. Finding that the “controlling purpose” of the condemnation was slum clearance, with any re-sale being “incidental and ancillary to the primary and real purpose of clearance,” the Court held the taking constitutional. *Id.* at 720. The terms “public use” and “public purpose” were used interchangeably by the *Slum Clearance* Court; however, it is clear that the taken property would ultimately be used and controlled by private entities.

In 1963, Michigan statutes authorized the taking of private property for “public use *or* benefit.” MCL 213.23 (emphasis added). Act 149 was enacted by the Michigan Legislature in 1911, and for more than fifty years public corporations and state agencies took property pursuant to the authorization granted in Act 149 before the Constitution was ratified in 1963. By equating public use and public purpose in Act 149, the Legislature indicated its understanding that either concept could properly form the basis of a taking.

D. An Inflexible “Public Use” Standard Is Incompatible With The Constitution

The historical evidence presented above demonstrates that the common understanding of the term “public use” at the time the 1963 Constitution was ratified was that a taking must be for the *benefit* of the public. The plain meaning of the word “use” is “to bring or put into service” or

“employ.” *The American Heritage Dictionary* (1991). Thus, property is taken for a public use where it serves the public. “Public use,” then, cannot be viewed in a historical vacuum. Those projects that benefit the public today may not be the same projects that will provide benefit to the public in fifty or one-hundred years. This Court has declared that a public use “changes with changing conditions of society and that the right of the public to receive and enjoy the benefit of the use determines whether the use is public or private.” *Poletown, supra* at 630, citing *Hays v Kalamazoo*, 316 Mich 443, 453-453; 25 NW2d 787 (1947).

Relying on Justice Ryan’s dissent, Defendants claim that *Poletown* was a radical departure from precedent. Further, they claim that the *Poletown* Court “ignored the historically consistent and textually faithful public use test.” This is just not true. Granted, for the *Poletown* majority the transfer of property to a private entity, in and of itself, did not destroy the public use of the taking. However, as is discussed above, this concept was not a new one. See *Slum Clearance, supra*; *Lakehead Pipeline Company, supra*; *Detroit International Bridge Company, supra*; *Swan, supra*. For more than a century before *Poletown* this Court sanctioned takings where a private entity would not only use *and* own the condemned land, but the public could be denied access. The notion that the “public use” requirement must be flexible in order to meet the modern needs of communities was recognized as early as 1852, when the *Swan* Court stated that as society grows and changes, “the laws must adapt themselves to the existing state of things, not arbitrarily, but by natural gradations.” *Swan, supra* at 438.

In 1870, Justice Cooley manifested his disagreement with the exercise of eminent domain on behalf of railways owned by *private* parties, stating that “no principle was older, and none seemed better understood or more inflexible, than that one man’s property could not be taken under the power of the government and transferred to another against the will of the owner.” *People ex rel*

Detroit & Howell R Co v Salem Twp Board, supra at 479-480. For Justice Cooley, the controlling factor was that the railroad companies were private corporations, managing their own properties for their own profit. *Id.* Even as early as the 1870s, however, Justice Cooley was in the minority. Well before the dawn of the 20th century, both Michigan's Legislature and its judiciary had abandoned an interpretation of the public use requirement that would require either that the public own the property after it was condemned or that members of the public have unfettered access to it. See generally *Swan, supra*.

Both Justice Ryan and Defendants have fallen prey to what Justice Cooley termed the "convenient fiction" of the creation of a so-called exception to the public use requirement. *Id.* While Justice Ryan opposed the use of eminent domain in *Poletown*, he readily admitted that there do exist circumstances where "condemnation of property for transfer to private corporations" is allowed. *Poletown, supra* at 670. The *fiction* that Justice Ryan created and is relied upon by Defendants does not withstand scrutiny, however. Justice Ryan excused the use of eminent domain in cases like *Swan*, *Lakehead Pipeline*, and *Detroit International Bridge Company*, as an exception to the general rule, where, in fact, these cases are not exceptions at all - they are *the* rule. Justice Ryan's inconsistency is belied by his acceptance of the use of eminent domain in the slum clearance cases. There, the Justice ignores the public use requirement altogether and focuses *only* on the public purpose underlying the takings. Apparently, in some situations, even Justice Ryan would authorize condemnation where the "object" of eminent domain was not to confer a private benefit, but instead to promote a public purpose. *Poletown, supra* at 672-673.

The *Poletown* Court determined that, where examining the purported public use of a given taking, the proper inquiry is whether the proposed taking was "for the primary benefit of the public or the private user." *Poletown, supra* at 632. Dubbed the "public purpose" test, this standard is

nothing more than an amalgamation of over a century of takings jurisprudence. It is a streamlined standard that courts can easily apply to determine whether the public use requirement of the Constitution is compromised by a proposed taking. The “public purpose” test is consistent with Article 10, §2 of the Michigan Constitution. It provides the most workable standard suggested by Michigan courts to date by which the judiciary can balance both public and private interests and determine whether any given taking is for a public use.

V. THIS COURT SHOULD NOT OVERRULE *POLETOWN*, AND IF IT DOES, THAT DECISION SHOULD NOT BE APPLIED RETROACTIVELY TO BAR THESE TAKINGS

This Court’s order granting Defendants’ application for leave to appeal indicated a willingness to revisit *Poletown* and to possibly overrule it. There are a number of reasons in addition to the legal validity of *Poletown* that should persuade this Court to affirm the “public purpose” test and, by extension, the acquisitions in this case. Even if this Court does not affirm the holding in *Poletown*, any decision to overrule it should be applied on a prospective basis only, therefore allowing the Pinnacle Project to proceed.

A. This Case Does Not Present The Court With A Reason To Overrule *Poletown*’s Public Purpose Test Or Bar These Takings

To overrule *Poletown*’s “public purpose” test would be to overrule Michigan takings jurisprudence dating back to the 1850s. Precedent is not lightly overruled. *Stare decisis* “promotes the evenhanded, predictable and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *Pohutski v City of Allen Park*, 465 Mich 675, 693; 641 NW2d 219 (2002). When determining whether to apply the doctrine this Court should determine whether *Poletown*, “defies practical workability, whether reliance interests would work an undue hardship, and whether changes in the law or facts no longer justify the questioned decision.” *Robinson v City of Detroit*, 462 Mich 439,

464; 613 NW2d 307 (2000), citing *Planned Parenthood v Casey*, 505 US 833; 853-856; 112 SCt 2791; 120 LE2d 674 (1992). The first question, however, should be whether the earlier decision was wrongly decided. *Id.*

1. *Poletown's "Public Purpose" Test Has Succeeded To Date, And Only Those Projects Where The Public Interest Predominates Over Incidental Private Interests Have Been Allowed to Proceed*

The facts of this case do not require that *Poletown* be overturned. In the more than twenty years since *Poletown* was decided, Michigan courts have faithfully applied its holding to a variety of situations and factual circumstances. *Poletown* has not served as a rubber stamp for public bodies who seek to condemn for economic development purposes. In fact, quite to the contrary, it has been the foundation on which the courts have weeded out projects that do not truly benefit the public.

The "practical workability" of *Poletown* has been proven. As is discussed supra in section III(C), *Poletown's* "public purpose" test has been utilized for more than twenty years. It has guided Michigan courts in balancing interests and benefits to determine whether the predominant interest being advanced by a proposed project is that of the public. It has allowed courts to review the unique facts presented by each condemnation project, and determine, on a case by case basis, whether the condemning authority intends to benefit the public or a private interest. *Poletown* is more than workable; it is a success.

2. *The Circumstances Surrounding The Case At Bar Do Not Require Overruling Poletown*

Justice Ryan in his dissenting opinion in *Poletown*, issued the following warning: "the reverberating clang of its economic, sociological, political and jurisprudential impact is likely to be heard and felt for generations." *Poletown, supra* at 644-645. Further, it was his opinion that the Court had "seriously jeopardized the security of all private property ownership." *Id.* Justice Ryan's prognostications, however, have not come to fruition. Instead, the courts have relied on *Poletown*

to strike down the Private Roads Act (*Tolksdorf*), to enjoin a municipality from condemning land for a *public* road where the court found that a private party would primarily benefit (*Adell Trust*), and most importantly to forbid private companies from buying a municipality's condemnation powers to accomplish what they otherwise could not do through arm's length negotiations (*Chmelko, Edward Rose*). On the other hand, the Courts have allowed projects like the Fox Theatre District (*Lucas*) and the Pinnacle Project to proceed. Both of these projects were initiated by a public body with the intent to substantially benefit their constituents, and in both cases, the benefit to private interests is truly incidental. The simple fact is that *Poletown's* heightened scrutiny test has worked exactly as intended.

As Justice Ryan correctly stated, *Poletown* was "an extraordinary case." *Poletown, supra* at 645. Whether *Poletown* was rightly or wrongly decided does not, however, end this Court's inquiry, for "the mere fact that an earlier case was wrongly decided does not mean overruling it is invariably appropriate." *Robinson, supra* at 445. This case does not require this Court to revisit the holding in *Poletown* as it applied to its specific factual circumstances, because the Pinnacle Project does not implicate many of the concerns at the heart of that taking.

As the Court of Appeals noted in this case, "there is no identified or individual private company instigating or developing the taking of defendants' property," and thus, "the present taking is even more supportable than the one in *Poletown*" (Appeals Opinion, p 10, Apx 986a). The Pinnacle Project is somewhat similar to *Poletown* in that it is a condemnation for a so-called "industrial park." However, a review of the factual underpinnings of these two cases demonstrates that the Pinnacle Project is a publicly-initiated, publicly-funded and publicly-developed project. To date, there has been no private company included in the planning stages. The role and involvement

of private interests in *Poletown* stand in stark contrast to the Pinnacle Project. Justice Ryan's concerns are evident in the following passage taken from his dissenting opinion:

The evidence then is that what General Motors wanted, General Motors got. The corporation conceived the project, determined the cost, allocated the financial burdens, selected the site, established the mode of financing, imposed specific deadlines for clearance of the property and taking title, and even demanded 12 years of tax concessions. [*Id.* at 657.]

Later, Justice Ryan elaborated and stated:

In the case before us the reputed public "benefit" to be gained is inextricably bound to ownership, development and use of the property in question by one, and only one, private corporation, General Motors, and then only in the manner prescribed by the corporation. The public "benefit" claimed by defendant to result can be achieved only if condemnation is executed upon an area, within a timetable, essentially for a price, and entirely for a purpose determined not by any public entity, but by the board of directors of General Motors. [*Id.* at 674.]

Tellingly, in his dissent in *Poletown*, Justice Fitzgerald approved the result in *Prince George's County, supra*, comparing the participation of private entities in the condemnation proceedings:

Second, it is worth noting that the Maryland and Minnesota cases cited above are distinguishable and that in each it was the governmental unit that selected the site in question for commercial or industrial development. By contrast, the project before us was initiated by General Motors Corporation's solicitation of the city for its aid in locating a factory site. [*Poletown, supra* at 644.]

It seems probable, then, that many of the *Poletown* dissenters' concerns would have been alleviated if they were presented with the underlying facts of the Pinnacle Project.

3. Overruling *Poletown* Would Work An Undue Hardship Upon The Citizens Of Wayne County

If this Court was to overrule *Poletown*, a tremendous hardship would befall the County. As the trial court record demonstrated, there is surprisingly little demand in the area south of the airport, and without achieving a critical mass of assembled property and properly marketing the property, the County has no prospect of putting the land to an economically profitable use as mandated by the

FAA (Tr, 9/26/01, p 40-50, Apx 108b). Without the County's initiative, the area would have remained fallow for the foreseeable future.

After purchasing 500 acres of residential land with the help of FAA funds and determining that a critical mass of property must be assembled before the County's vision could become a reality, the County set about attempting to purchase more land. Eventually the County determined that it would have to utilize its powers of eminent domain to complete the assembly. Relying on Act 149 as substantive authority to condemn, and upon both *Poletown* and the significant body of law affirming the standards set forth therein, the County expended millions of dollars in property acquisition and project planning. The County has assembled 98% of the project area and is ready to make this project a reality. To date, the County has spent \$19,828,000 on legal expenses, condemnation proceedings, zoning coordination, site planning, wet lands analyses, market feasibility studies, accounting projections, marketing, development of a job training program, exploration, property maintenance, engineering studies and plans, as well as other areas (Tr, 9/28/01, p 26-28, Apx 598a). In addition the County spent an additional \$31 million in funds for property acquisition made through voluntary purchases. *Id.* Therefore, a sum total of \$50 million of the County's general fund has been approved and spent on the Project to date. The County's reliance was well placed. For more than 20 years municipalities in Michigan have been allowed by state statute to take property for economic development purposes, and the judiciary has repeatedly blessed such takings.

Both lower courts have determined that without the remaining pieces, the project cannot go forward (Opinion, p 20-21, Apx 936a; Appeals Opinion, p 7, fn 7, Apx 983a). Without the Project, Wayne County will be left with title to over 1,100 acres of land located adjacent to one of the world's largest and busiest airports that will remain vacant and underutilized, providing absolutely no benefit to the local communities or the region.

B. If The Court Overrules *Poletown*, A New Standard Must Be Adopted To Guide Judicial Review Of Takings Where The Property Will Ultimately Be Transferred To Private Entities

Depending on the nature of a decision overruling *Poletown*, the ramifications to municipalities could be devastating. If this Court declares that a municipality may never condemn land for the eventual transfer to private entities, such a decision would necessarily eradicate not only the EDCA, but also many other state statutes that allow private property to be condemned and subsequently transferred to private entities. These statutes include the Neighborhood Area Improvements Act, MCL 125.941, *et seq.*, the Downtown Development Authority Act, MCL 125.1651, *et seq.*, and the Brownfield Redevelopment Financing Act, MCL 125.2651, *et seq.* Additionally, public bodies could not condemn for utilities (*Lakehead Pipe Line Company*) or for privately-owned bridges and railroads (*Swan, Detroit International Bridge Company*). Any new standard announced by this Court will be critical not only in the analysis of the case at bar, but also as a guide for courts in future takings cases.

In his dissent in *Poletown*, Justice Ryan openly admitted that: “It is plain, of course, that condemnation of property for transfer to private corporations is not wholly proscribed.” *Poletown*, *supra* at 670. The Justice termed his so-called exception to the general rule, “the instrumentality of commerce exception,” and went on to state that “it may be argued, however, that the fact that the case before us lies outside the exception does not end the inquiry if the reasons justifying the existing exception are present here.” *Id.* at 674. He then set about detailing three common elements justifying the exception, including (1) public necessity of the extreme sort; (2) continuing accountability to the public; and (3) choosing land pursuant to facts of independent public significance.⁵ While Justice Ryan asserted that *Poletown* failed to satisfy any of these pertinent elements, application of these

⁵Notably, Judge Whitbeck recently revisited Justice Ryan’s analysis of the instrumentality of commerce exception in *Adell Trust*, *supra* at 343, due to its persuasive value.

standards to the Pinnacle Project demonstrates that the County's proposed taking can be found constitutional based on even Justice Ryan's dissent.

1. The Proposed Takings Are To Further A Public Necessity Of The Extreme Sort That Is Otherwise Impracticable

"Public necessity of the extreme sort", as described by Justice Ryan, "has not to do so much with the public benefit...as with the indispensability of compelled expropriation of property to the very existence of the enterprise pursued by the private corporation." *Id.* at 675. For example, railroads and highways require specific assemblages of properties that without the use of eminent domain, would be "otherwise impracticable." *Id.* Justice Ryan also reviewed this principle as applied to slum clearance cases, citing the following:

If each property owner within a chosen (urban renewal) area were allowed to successfully attack the plan as plaintiff attempts to do here, urban renewal would be stymied and impossible of accomplishment. *Ellis v Grand Rapids*, 257 F Supp 564, 568-569 (WD Mich, 1966). [*Id.*]

Central to the outcome of this case is the very genesis of the Pinnacle Project. Without the use of condemnation, the County is unable to bring the project to fruition. As the court stated in *Ellis, supra*, if each property owner inside the project boundaries could successfully attack the plan, the Pinnacle Project would be stymied and impossible of accomplishment. The Pinnacle Project can not be moved to another locale in the County, because its very existence is an outgrowth of the County's initial ownership of 500 acres following the Noise Abatement Program. Also critical to the success of the Pinnacle Project is a public/private partnership (Tr, 9/27/01, p 36-37, Apx 166b). Expert testimony provided at trial established that it would be impossible for a private developer to undertake the Pinnacle Project and have it be financially successful (Tr, 9/27/01, p 23, Apx 153b). The Court of Appeals recognized this necessity, stating:

In our view, taking defendants' property, which is next to the airport, is "necessary" to the Pinnacle Project simply because the project area encompasses defendants'

property. It would appear to be strategically difficult to build this complex commercial development literally around defendants' largely vacant properties. Cf. *Robert Adell Children's Funded Trust, supra*, at 351, quoting *Poletown Neighborhood Council v City of Detroit*, 410 Mich 616, 675-676; 304 NW2d 455 (1981) (Ryan, J., dissenting) ("A railway cannot run around unreasonable landowners."). Put another way, the developers likely will not go through with the project if plaintiff does not acquire defendants' property, and the entire project might be lost. [Appeals Opinion, p 7, fn. 7, Apx 983a.]

In *Poletown*, Justice Ryan found this element lacking, stating that "it could hardly be contended that the existence of the automotive industry or the construction of a new General Motors assembly plant requires the use of eminent domain." *Poletown* at 478.

2. The Eventual Private Users Of The Pinnacle Project Will Continue To Be Accountable To The Public

The second element central to the instrumentality of commerce cases is the "retention of some measure of government control over the operation of the enterprise after it has passed into private hands." *Id.* Such "control" clearly does not grant the public the right to access or use the property necessarily. For example, after land is transferred to a private utility company, the public has no right to enter upon the land, or to reap the benefits of its use. Instead, this control amounts to the state having "a voice in the manner in which the public may avail itself of its use." *Id.* at 677, quoting *Board of Health of Portage Twp v Van Hoesen*, 87 Mich 533, 539; 49 NW 894 (1891). Thus, railroad companies are subject to "a panoply of regulations." *Id.* Justice Ryan also referenced the *Detroit International Bridge Company* case, stating that while the statute authorizing private companies to condemn for bridges "did not expressly prohibit private uses of the land by the corporations, the obligation to preserve the public purpose was implied from the acceptance of the right of eminent domain." *Id.* at 678. Applying this principle to the facts of *Poletown*, the Justice was appropriately troubled by the fact that once the land was transferred to GM, "there will be no

public control whatsoever over the management, or operation or conduct of the plant to be built there.” *Id.*

Unlike *Poletown* the Pinnacle Project is predominantly a public project. The Pinnacle’s Land Use Plan calls for 266 acres of the total Project to be dedicated to a public golf course and other open space, while 164 acres are being taken for road and road right-of-way improvements inside the boundaries (Land Use Plan, Apx 365b.)⁶ The County will keep title and jurisdiction to all roads, right-of-ways and open space improvements and, therefore, will maintain control over these lands. (Tr, 9/28/01, p 33, Apx 605a). The new utility system, including water, sewer and storm water retention, will be built by the County and then turned over to the local communities who will own and control the improvements (Tr, 9/28/01, p 30-33, Apx 602a).

At the heart of the Pinnacle Project, 51 acres is devoted to the Pinnacle Town Center, which will house a hotel and small retail businesses. *Id.* Undeniably, a large portion of the Pinnacle Project will eventually come to be owned by private companies. However, the majority of those entities to be included in the Pinnacle Project are considered places of public accommodation pursuant to Article 3 of The Elliot-Larsen Civil Rights Act. MCL 37.2301(a) defines a place of public accommodation as follows:

... a business, or an educational, refreshment, entertainment, recreation, health, or transportation facility, or institution of any kind, whether licenced or not, whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public. Places of public accommodation also includes the facilities of the following private clubs: (i) A country club or golf club. (ii) A boating or yachting club. (iii) A sports or athletic club.

⁶It cannot be denied that Wayne County has the statutory right to take property for roads under Act 149 and otherwise, and this Court has upheld the taking of private property for a golf course in *People for Use and Benefit of Regents of University of Michigan v Pommerining*, 250 Mich 391, 230 NW2d 194 (1930).

Such places of public accommodation are regulated as follows:

Except where permitted by law, a person shall not deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of religion, race, color, national origin, age, sex or marital status. [MCL 37.2302(a).]

The Civil Rights Act, as well as other state and federal legislation prohibits private entities from excluding certain members, thereby retaining the quasi-public character. Much like the regulations on railroads which see “to it that the public has equal and fair access to use of the railroad,” the majority of the private end users of the Pinnacle Project will be subject to similar regulations. *Poletown* at 677.

The Pinnacle Project will remain accountable to the public in much more substantive ways than the railroads and bridges that Justice Ryan endorsed. Testimony at trial was unequivocal that the Smart Park board, in conjunction with local zoning officials, will decide which end users will be permitted to participate in this Project and under what terms. The Pinnacle Project will develop with only the types of private industries the County determines will best promote the interests of the communities (Tr, 9/24/01, p 50-51, Apx 50b). This will only be done after careful consideration of whether these end users fit within the County’s contemplated view of this Project and whether such end users will advance the public goals and objectives for the Pinnacle Project set by the County Commission. *Id.* Also, a book of standards and development covenants has been created to guide development. *Id.* Thus, the County and, through its Commission, the citizenry will maintain significant control of this land.

3. The Land For The Pinnacle Project Was Chosen Pursuant To Facts Of Public Significance

The last element common to Justice Ryan’s cases is that where land is taken for transfer to a private entity, the decision of which specific land is to be condemned is made, not pursuant to the

interests of the private entity, but instead, upon “criteria related to the public interest.” *Poletown* at 680. As an example, citing *Slum Clearance*, the Justice noted: “condemnation of land for slum clearance is determined by the location of the blight.” *Id.* There was no dispute in *Poletown* that GM had chosen the site and designated the boundaries, and that, the land therefore was not chosen pursuant to any facts of independent significance.

The Pinnacle Project stands in direct contrast to *Poletown*, in that the project area was chosen based entirely upon facts of public significance. The County designated this area for the Project as a result of the Noise Abatement Program’s mandate. The very genesis of the Project sprung from the County’s ownership of 500 acres of land in the vicinity that it was legally bound to develop. Also, as County officials testified, the close proximity to the airport and access to I-275 and I-94 made this area an “ideal location” (Tr, 9/24/01, p 20, Apx 20b).

Michigan case law in existence before *Poletown* supports the proposed taking for the Pinnacle Project. Even if this Court overrules *Poletown*, and adopts Justice Ryan’s dissent, the County’s condemnation is constitutional and should be upheld.

C. Should The Court Overrule *Poletown*, The Four-Factor Balancing Test Utilized By The Pohutski Court Requires That This Court’s Decision Be Applied On A Prospective Basis Only

In *Pohutski*, the Court held that the governmental tort liability act did not preserve the common-law trespass nuisance exception to the general rule of governmental immunity. *Pohutski*, *supra* at 678-679. This holding overruled *Hadfield v Oakland County Community Drain Comm’r*, 430 Mich 139; 422 NW2d 205 (1988). However, the Court gave its holding only prospective effect. *Pohutski*, *supra* at 696. While the Court remarked that as a general rule “judicial decisions are given full retroactive effect,” it was persuaded, after taking into account the entire situation, that prospective application of its decision was proper in that case. *Id.* State courts may define the limits

of adherence to precedent and may choose “between the principle of forward operation and that of relation backward.” *Wainwright v Stone*, 414 US 21, 24; 94 SCt 190 (1973). This principle applies with equal force in the area of constitutional adjudication, for the constitution “neither prohibits nor requires retrospective effect.” *Linkletter v Walker*, 381 US 618, 629; 85 SCt 1731 (1965).

The *Pohutski* Court adopted four factors to be balanced when determining whether a decision is to be applied retroactively or prospectively. They are: (1) the purpose to be served by the new rule; (2) the extent of reliance on the old rule; (3) the effect of retroactivity on the administration of justice; and (4) whether the decision clearly establishes a new principle of law. *Id.*, citing *Linklater*, *supra*; *Riley v Northland Geriatric Center (After Remand)*, 431 Mich 632, 645-646; 433 NW2d 787 (1988).

As a preliminary matter, the *Pohutski* Court determined that overruling *Hadfield* was “practically speaking” an announcement of a new rule of law. *Pohutski*, *supra* at 697. In applying the remaining three factors the Court observed that: (1) prospective application would further the purpose of the new rule: to correct an error in the interpretation of a statute; (2) there had been extensive reliance on *Hadfield*’s interpretation and prospective application would acknowledge that reliance; and (3) prospective application would minimize the effect of its decision on the administration of justice. *Id.* Following its analysis, the Court ordered that the new rule would apply only to those cases brought on or after the date of its decision, April 2, 2002. *Id.* at 699. Application of this four-pronged balancing test to this case demonstrates that any decision overruling *Poletown* should be applied on a prospective basis.

Presumably, any decision by this Court to overrule *Poletown* would amount to a holding that Article 10, §2 of the Michigan Constitution forbids the taking of private property where title may eventually be transferred to a private interest. This would be a stark departure from takings

jurisprudence spanning back to the Supreme Court's decision in *Swan* in the 1850s. Even if this Court did not wholly proscribe condemnation of private property for transfer to private entities, but was to declare unconstitutional the EDCA as the *Poletown* dissenters urged, over twenty years of case law and presumably many statutes would fall by the wayside. Such a holding would obviously be the announcement of a new rule of law.

The Defendants contend that a decision by this Court to overrule *Poletown* would not be a new rule, and instead, would be the proper interpretation and application of a constitutional prohibition. The Supreme Court, however, has routinely held that although a decision may give effect to the original intent of the Legislature, where erroneous interpretations of a statute are later overruled, such holding is tantamount to the announcement of a new rule. *Pohutski, supra* at 697; *Gusler v Fairview Tubular Products*, 412 Mich 270, 298; 315 NW2d 388 (1980). Here, the high Court articulated a standard in *Poletown*, and a significant body of case law following it, including two more decisions of the Supreme Court (*Edward Rose Realty, supra*, and *Tolkdorf, supra*) have reaffirmed the use of the very same standard. In fact, the *Tolksdorf* Court applied *Poletown*'s public purpose test less than three years ago. To now overrule *Poletown* can be seen as nothing less than an announcement of a new rule of law.

As the Court observed in *Pohutski*, the purpose of the new rule set forth in that opinion was "to correct an error in the interpretation of the government tort liability act." *Pohutski, supra* at 697. If this Court was to overrule *Poletown*, the purpose would undoubtedly be the same. Prospective application of any new rule would further the Court's purpose, while also accounting for the reasonable reliance made by the County and other condemning authorities in the declaration of necessity to take private property for use in projects akin to the Pinnacle Project.

The County's extensive reliance on *Poletown* and the subsequent case law in commencing these condemnation proceedings is set forth supra at V(A)(3). Additionally, as is made obvious by the City of Dearborn's Motion for Leave to File Brief Amicus Curiae in Support of Plaintiff-Appellee, the County is not alone in its reliance. While there is no way to approximate the number of economic development projects initiated by the state and local governments in reliance on *Poletown*'s public purpose test, it must be recognized that there is the potential that a great many have already begun condemnation proceedings. It appears that the City of Dearborn, like the County, and undoubtedly other public corporations, have expended millions of dollars in reliance on this extensive body of case law.

Should the Court overrule *Poletown* and presumably invalidate the County's proposed takings, the County and its citizens would be left with no recourse and unable to complete the Pinnacle Project. Additionally, the approximately 1,200 acres already owned by the County in the project area would remain fallow and off the tax rolls. The County and all other public bodies who had not had the good fortune of obtaining title to properties necessary for economic development projects would become a "distinct class," unable to take for economic development purposes because of "an unfortunate circumstance of timing." *Pohutski, supra* at 699. In light of a reversal of *Poletown*, justice would be most fairly administered if this Court declared that for all resolutions of necessity passed by public bodies before the date of the Court's decision, the old rule would apply. This type of prospective application would allow for public bodies to plan proposed projects in light of the new rule and would not punish the condemning authorities and their citizens who relied on the old rule.

CONCLUSION

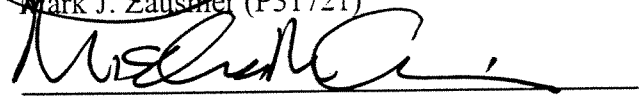
For the foregoing reasons, the County respectfully requests that this Court affirm the takings in this case.

Respectfully submitted,

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